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

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether, under the standards set forth in AEDPA, 28 U.S.C. § 2254(d), the Mississippi Supreme Court unreasonably determined that petitioner waived his right to rebut the prosecutor's asserted race-neutral reasons for exercising peremptory strikes against four black jurors.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Terry Pitchford, who was the petitioner-appellee below.

Respondents in this Court are Burl Cain, the Commissioner of the Mississippi Department of Corrections, and Lynn Fitch, the Attorney General for the State of Mississippi, who were defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

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

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); JA573-686 (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); JA687-711 (granting the writ on partial summary judgment).

Pitchford v. *Cain*, 126 F.4th 422 (5th Cir. 2025); JA716-732 (reversing grant of writ, remanding to district court).

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BRIEF FOR PETITIONER

INTRODUCTION

Racial discrimination in jury selection is "a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson* v. *Kentucky*, 476 U.S. 79, 85 (1986). When participation in jury service depends on the color of a person's skin, it offends the rights of defendants and prospective jurors alike. *Id.* It also threatens "public confidence in the fairness of our system of justice." *Id.* at 87. This Court has "vigorously enforced and reinforced" that position "and guarded against any backsliding." *Flowers* v. *Mississippi*, 588 U.S. 284, 301 (2019) (collecting cases).

This case calls for the Court to do so once again. In 2006, Terry Pitchford was tried for a capital crime before a 12-member jury with a single black juror, in a

county that is 40% black. The skewed racial makeup of his jury was not an accident. Nor are the cast of characters in his case strangers to this Court. Pitchford was tried by the same prosecutor and before the same trial judge as Curtis Flowers. This Court reversed Flowers's conviction based, in part, on the trial court's failure to apply *Batson*, and the prosecution's "blatant pattern of striking black prospective jurors." *Id.* at 301, 305.

In Pitchford's case, District Attorney Doug Evans marked up his juror list with "W" and "B" next to prospective jurors, indicating their race. Evans then struck each of the first 4 qualified black jurors and accepted 16 of the first 18 qualified white prospective jurors. But Evans's strikes of prospective black jurors were not based on anything they said in voir dire; indeed, 3 of the black jurors that Evans struck were never asked any questions during voir dire at all.

Pitchford objected to the apparent racial motivation of these peremptory strikes and pressed the trial court three times to examine the prosecution's purported reasons for the strikes against all relevant circumstances. But once the prosecution proffered race-neutral reasons for the strikes, the trial court refused to hear further argument from Pitchford's counsel and overruled her *Batson* objection. After a 4-day trial, the jury convicted Pitchford and sentenced him to death.

The Mississippi Supreme Court affirmed, holding that Pitchford had waived at trial his opportunity to rebut the prosecution's stated reasons for its strikes. The Mississippi Supreme Court reached that conclusion even though the trial court foreclosed any opportunity for rebuttal, even though Pitchford repeatedly sought an opportunity to provide further argument in

support of his *Batson* challenge, and even though the trial court had assured Pitchford's counsel that her *Batson* challenge was "in the record." JA175.

The state courts' handling of Pitchford's claim violated *Batson*. *Batson*'s three-step test aids parties and courts in identifying racially discriminatory peremptory strikes. Step 1 tasks defendants with making "a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Miller-El* v. *Cockrell*, 537 U.S. 322, 328-329 (2003) (*Miller-El I*). Step 2 requires that the prosecution "offer a race-neutral basis for striking the juror in question." *Id.* At Step 3, the defendant must have an opportunity to rebut the prosecution's proffer, and then, "in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Id.*

The trial court violated Pitchford's rights and abdicated its duty when it denied Pitchford an opportunity for rebuttal and accepted the prosecution's proffers at face value without making the requisite final assessment on whether Pitchford had shown purposeful discrimination in light of all the circumstances. And the Mississippi Supreme Court refused to remedy that error, rejecting argument in support of Pitchford's preserved *Batson* claim on "waiver" grounds, in lieu of considering record evidence of intentional discrimination. *See* JA584-585 & n.16.

This Court should remedy the state courts' error for two reasons. *First*, the Mississippi Supreme Court's waiver finding was an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). Pitchford pressed his *Batson* claim repeatedly, and stopped doing so only when ordered by the trial court to stop, and only with

the court's explicit assurance that his objection was preserved. JA167-176. The Mississippi Supreme Court's waiver finding is impossible to reconcile with the record and the state court's own *Batson* waiver rules. JA175-176.

Second, the Mississippi Supreme Court's decision was also an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). After the trial court failed to give Pitchford a meaningful opportunity to rebut the prosecutor's proffers—and accepted the prosecution's proffers as determinative without deeper scrutiny or analysis of whether purposeful discrimination occurred—the Mississippi Supreme Court had two options: (a) cure the errors itself, based on Pitchford's arguments and the existing record, or (b) reverse and remand for a *Batson* hearing or new trial. By failing to do either, the Mississippi Supreme Court unreasonably applied clearly established federal law and deprived Pitchford of an adequate state forum for his *Batson* claim.

"In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers*, 588 U.S. at 298. Here, a series of racially discriminatory peremptory strikes shaped a jury that convicted Pitchford of felony murder and sentenced him to death for a robbery that occurred when he was 18. Habeas relief is essential to remedy this grave wrong. *Miller-El* v. *Dretke*, 545 U.S. 231, 266 (2005) (*Miller-El II*). This Court should reverse.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 126 F.4th 422. JA716-732. The district court's opinion is reported at 706 F. Supp. 3d 614. JA687-711.

JURISDICTION

The Fifth Circuit entered judgment on January 17, 2025. JA716. The Fifth Circuit denied a timely petition for rehearing on January 28, 2025. JA714-715. On April 18, 2025, Pitchford applied for an extension of time to file a petition for writ of certiorari. No. 24A1022. Justice Alito granted the application, extending the time to file through May 28, 2025. Pitchford timely filed the petition on that day. This Court granted the petition on December 15, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state 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.

U.S. Const. amend. XIV, § 1.

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[.]

U.S. Const. amend. VI.

This case also involves 28 U.S.C. § 2254(d), which 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.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

In 2004, 18-year-old Terry Pitchford was arrested and charged with the murder of a shopkeeper, Reuben Britt. ROA.1315-16; *see* JA573-575.

The State did not accuse Pitchford of killing Britt. JA573-575. Instead, the prosecution's theory of the case was that a different person—Eric Bullins—had shot Britt five times with his .22 revolver while the two teenagers were robbing Britt's bait and supplies store. *Id.*; *see* Tr. 401:23-404:15, 416:21-417:4. [1] Bullins then turned his six-shooter on Pitchford, forcing Pitchford to shoot into the floor. *See* Tr. 400:15-29. Pitchford's gun was loaded with "rat shot" instead of bullets, and evidence showed that the pellets did not

[1] The transcript of voir dire is included in the joint appendix. The remainder of the trial transcript is available at https://perma.cc/53B7-P8BF.

contribute to Britt's death. Tr. 400:21-29, 401:3-18, 421:13-18.

The State nevertheless charged Pitchford with felony murder, and sought the death penalty.[2] Doug Evans, the Fifth Circuit Court District Attorney, took the case to trial.

1. Voir Dire. Before trial, 126 prospective jurors returned completed juror questionnaires to the circuit court; 30 of them received excusals or were otherwise released from jury service. *See generally*, *e.g.*, JA575, JA740-1545.

A 96-person venire assembled in the Grenada Circuit Court on February 6, 2006, for trial. JA575. At the outset, this venire consisted of 60 white individuals and 36 black individuals, roughly reflecting the demographics of the county where Pitchford was tried; nearly 40% of that venire was black. *See* JA176; ROA.2196-99. Evans took note, writing "W" next to the names of all white venire members and "B" next to the names of all black venire members before listing copy-and-paste reasons for striking each black member. *See* JA173-176 (listing juror names); ROA.2186-

[2] Bullins was also capitally charged, but because he was 16 at the time of the robbery, he became ineligible for the death penalty months after the crime. *See Roper* v. *Simmons*, 543 U.S. 551 (2005). In jail, Bullins stomped another inmate to death. ROA.17502. District Attorney Evans refrained from resolving Bullins's indictment in the Britt murder until nearly a year after Pitchford's trial, when Bullins pled guilty to manslaughter. The court sentenced Bullins to 20 years in prison, with 10 years to run concurrently with the 20-year sentence Bullins received for the jail murder. ROA.17663.

21 (Evans's juror list); ROA.2196-99 (cataloguing Evans's handwritten notes about each black venire member).

By the end of jury selection, however, only one of the 14 empaneled jurors and alternates was black. *See* JA173-176. The court and the parties winnowed the jury through questioning, strikes for cause, and peremptory strikes.

The court first questioned the venire regarding their eligibility for service in this case. JA16-86. The judge then tendered the panel to Evans to ask questions. JA87-109. After Evans, Pitchford's trial counsel examined the venire. JA109-143.

The court next turned to cause strikes. After a brief individual voir dire for six venire members, the trial court specified an additional 42 individuals to be excused for cause. JA145-158. Pitchford's counsel, Alison Steiner, identified additional cause challenges, including four that the trial court allowed. JA158-163, 166-176. The prosecution, through District Attorney Doug Evans, also made an additional cause challenge, asking the court to strike Linda Ruth Lee for cause because she had been late returning from the lunch recess. But the judge denied that request, stating "she is trying real hard to be here and fulfill her civic duty as a juror." JA163.

Finally, the court turned to peremptory strikes. Led by Evans, the prosecution accepted 16 of the first 18 white venire members tendered. The prosecution then used four consecutive peremptory strikes on black venire members, eliminating Linda Ruth Lee, Christopher Tillmon, Patricia Tidwell, and Carlos Ward from the panel. JA166-170. The prosecution directed no questions to Ward, Lee, or Tillmon before exercising

these strikes. *See* JA667-671 (Graves, P.J., dissenting).

Steiner objected, stating: "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 American juror out of the five * * * that have thus far arisen on the venire." JA167. Steiner also directed the trial court to "[t]he most recent *Miller-El versus Dretke* case" where this Court reversed a conviction even though the prosecution "left either one or two black jurors on the venire." JA168.

The trial court initially entertained the challenge, concluding that requiring race-neutral reasons from the prosecution "would be appropriate given the number of black jurors that were struck." *Id*. Steiner reminded the court that *Batson* would not be satisfied merely by the prosecutor's race-neutral reasons, cautioning the court that it "must make a determination on the basis of all relevant circumstances to racial discrimination." JA169. The trial court responded, "I'll have the State give race neutral reasons." *Id.*

The prosecution proffered reasons for each of the four challenged strikes. JA169-170. The trial court did not, however, make findings regarding the credibility of those statements. Instead, after finding the prosecution's fourth proffer "race neutral," the trial court immediately moved back to empaneling the jury. JA170 ("The Court finds that to be race neutral as well. So now we will go back and have the defense starting at [venire member] 37"). The prosecution then accepted nine of the next ten white venire members tendered. JA170-174; *see also* ROA.2186-95 (Evans's annotated juror list).

Steiner tried again to complete her *Batson* record before the jury was sworn in and sequestered. *See* JA175-176. She reminded the court that she "want[ed] to reserve" Pitchford's "*Batson* objection." *Id*. But the court refused to hear more, stating: "You have already made [the objection] in the record so I am of the opinion it is in the record." *Id.* Steiner pushed back, emphasizing that she did not want "the paneling of the jury [to] go by without having those objections." *Id.* Still, the court declined to hear further argument. *Id.*

2. Pitchford's Trial. The trial court began the guilt phase of Pitchford's trial immediately after seating the jury, requiring counsel to deliver opening statements that day. Tr. 337:1-15, 338:27-339:11. The balance of the liability phase, including the presentation of evidence, instructions conference, instructions, and deliberations lasted two days. *See* Tr. 346 (beginning February 7, 2006 proceedings); Tr. 656:21 (ending of liability phase). The penalty phase, including deliberations and verdict, lasted less than a day, as the court declined to wait when Pitchford's mitigation expert was detained under subpoena in another trial. Tr. 809:4-5, 810:26-27.

The evidence of Pitchford's guilt was thin. The prosecution never produced the weapon that Bullins used to murder Britt. And while the prosecution produced the weapon it claimed Pitchford had used, the prosecution's explanation of how they found it did not make sense. The prosecution said that Pitchford stole a .38 revolver from Britt during the robbery, shot Britt, and took the revolver with him when he fled. *See* Tr. 628:20-25, 649:19-25. Deputies later claimed to have found the revolver in Pitchford's vehicle. Tr. 105:7-8, 342:1-6, 493:21-497:9, 547:13-548:5. But photographs

of the crime scene taken by law enforcement immediately after the crime included a picture of a .38 revolver sitting on the store counter, suggesting it was not in Pitchford's car. ROA.14297-98; ROA.14916 (Eubanks deposition). The revolver in the crime scene photographs was not logged as collected by the sheriff's deputies who conducted the crime scene investigation, nor was it introduced into evidence at trial. *See* Tr. 498:26-499:12 (crime scene photograph admitted into evidence showing .38 revolver); Tr. 516:18-517:8, 628:3-19; *see also* ROA.14301-02 (crime lab's evidence log).

Law enforcement similarly mishandled efforts to get Pitchford to confess. Officers questioned then-18-year-old Pitchford for hours, through the afternoon and into the next morning. ROA.17582-83. Pitchford repeatedly denied involvement in the robbery and then invoked his right to silence. ROA.717-719. The same officers had four more statements from Pitchford typed up, without audio recordings, in the 18 hours that followed, in which Pitchford continued to deny shooting Britt. ROA.714-757. One officer eventually claimed—and testified at trial—that while his partner was out of the room and the tape recorder was off, Pitchford confessed to committing the robbery and murder with Bullins. Tr. 571:26-29; ROA.791. But the officer's trial testimony did not align with his written account of the purported confession, which stated that Pitchford only acknowledged shooting "into the floor" near Britt's fallen body. ROA.791.

On this evidence, Pitchford was convicted of capital murder and sentenced to death. The jury—from which the prosecution had peremptorily struck four of the

five black venire members qualified to serve—deliberated regarding Pitchford's guilt for less than an hour. Tr. 651:29-652:1. That same jury deliberated for just over an hour before concluding that Pitchford should be sentenced to death. Tr. 809:4-5, 810:26-27; *see* Tr. 812:19-28.

Pitchford moved for a new trial, re-raising his *Batson* challenge post-trial. JA179, JA184. The trial court denied the motion without comment. JA3; *see* JA576.

3. Direct Appeal. On direct appeal, Pitchford argued that the State discriminated on the basis of race in its peremptory strikes in violation of *Batson*. *See* JA573, JA577-585 (Mississippi Supreme Court ruling).

The Mississippi Supreme Court, over the dissent of two of its members, chose not to address that argument based on a finding of waiver. The majority began by acknowledging that the first two *Batson* steps were properly conducted; Pitchford established a prima facie case of intentional racial discrimination, and the prosecution offered explanations deemed race neutral on their face. JA577-584. But the Mississippi Supreme Court believed it need not address Pitchford's pretext arguments at Step 3 because he "did not present these arguments to the trial court." JA584. According to the Mississippi Supreme Court, this purported failure to rebut amounted to waiver and required the trial judge to "base his * * * decision on the reasons given by the State." JA584 (citation omitted) (collecting state *Batson* waiver cases). The Mississippi Supreme Court therefore refused to "entertain" Pitchford's arguments based on a comparative analysis of struck and seated jurors, along with his broader argu-

ments on why the record showed that the prosecution's strikes reflected intentional discrimination. JA585.

Presiding Justice Graves, joined by Justice Kitchens, dissented. In their view, accepting the prosecution's proffered justifications was "clearly erroneous," as the record showed that the prosecution did violate *Batson*. JA659-676. Tracking *Batson*'s three steps, the dissent explained that "the burden shifted to the State to rebut the prima facie showing with a race-neutral explanation as to each juror" and stayed there. JA672. At that point, Pitchford was free to rebut the State's evidence, "but there is no requirement under *Batson* that Pitchford *must* * * * rebut the rebuttal before the trial court." *Id.* (emphasis added). The dissent concluded that the majority's "suggestion that this Court cannot review the trial court's decision under the totality of the relevant facts is contrary to the applicable law." JA673.

4. Federal District Court Grant of Relief. Pitchford next sought relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The federal district court granted Pitchford's motion for habeas relief based on his *Batson* arguments. Observing that "*Batson* was well-settled law" at the time of Pitchford's 2006 trial, JA703, the district court explained that *Batson* created a "three-step inquiry," JA692-693 (quoting *Rice* v. *Collins*, 546 U.S. 333, 338 (2006)). After discussing the first two steps, the district court found that the trial court "failed to conduct the third *Batson* inquiry." JA703. Pitchford, first, made a prima facie showing of racial discrimination (Step 1); the prosecution then articulated its reasons for striking Lee, Tillmon, Tidwell and Ward (Step 2);

the trial court said those reasons were race-neutral (Step 2, again)—"and that was it." JA703-704. That, the district court explained, was an unreasonable application of *Batson*.

Next, rejecting the Mississippi Supreme Court's waiver finding, the district court noted that the trial record made clear that "Pitchford *did* object to the explanations provided when he raised the issue again and confirmed it was on the record." JA704. Given Pitchford's repeated attempts to make a record in the face of the trial court's "brusque determination that no violation had occurred," the court could not "ignore the notion that Pitchford was seemingly given no chance to rebut the State's explanations and prove purposeful discrimination." *Id*. The court therefore concluded that a *Batson* violation occurred.

The district court entered judgment for Pitchford, vacating his conviction and remanding for the state to initiate a new trial within 180 days or release Pitchford. JA711-713.

5. Fifth Circuit's Reversal. The Fifth Circuit reversed, holding that the Mississippi Supreme Court's waiver ruling was based on neither an unreasonable determination of the facts nor an unreasonable application of *Batson*. Ignoring the clearly established Supreme Court precedent that Pitchford invoked, including *Snyder* v. *Louisiana*, 552 U.S. 472 (2008), the Fifth Circuit rejected the district court's conclusion that the state courts erred when they truncated the *Batson* analysis. It also suggested that the trial court *had* conducted Step 3, concluding that a trial court need not "make explicit factual findings during *Batson*'s third step" and, instead, "may make implicit findings." JA724 (citations and quotation marks omitted).

The Fifth Circuit similarly concluded that it was reasonable for the Mississippi Supreme Court to determine, as a factual matter, that Pitchford waived his pretext argument. JA730-732 (discussing 28 U.S.C. § 2254(d)(2)). Relying on its earlier conclusion that "the state trial court completed all three steps of *Batson*," the Fifth Circuit opined that Pitchford had raised only "bare assertions" of pretext based on demographics, which the Fifth Circuit deemed insufficient to "overcome the State's race-neutral reasons." *Id.*

Pitchford sought certiorari, which this Court granted.

SUMMARY OF ARGUMENT

The jury that convicted Terry Pitchford and sentenced him to death was selected through racially discriminatory peremptory strikes. A prosecutor with a history of violating *Batson* administered these four strikes, and the state courts allowed this discrimination. This Court should reverse.

I. The prosecution engaged in intentional racial discrimination in selecting the jury for Pitchford's capital trial.

Batson's three-step inquiry is calibrated to "prevent racial discrimination from seeping into the jury selection process." *Flowers* v. *Mississippi*, 588 U.S. 284, 302 (2019). This inquiry vindicates the Equal Protection Clause in elements "fundamental to our democratic system": jury service and the right to be tried by an impartial jury of one's peers. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994); *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.").

Batson's inquiry creates obligations for the parties and the court. The first two steps turn on actions by the parties: Step 1 requires the defendant to make a prima facie showing of racial discrimination and, if satisfactory, the prosecution must proffer a race-neutral explanation for its strikes at Step 2. *See Snyder* v. *Louisiana*, 552 U.S. 472, 476-477 (2008). But *Batson*'s third step imposes a duty on the courts. After allowing defendants a meaningful opportunity to rebut the prosecution's race-neutral proffer, courts must "in light of the parties' submissions * * * determine whether the defendant has shown purposeful discrimination." *Id.* at 477 (citation omitted).

The Mississippi trial court foreclosed any rebuttal and failed to conduct *Batson*'s third step, which the Mississippi Supreme Court then disguised as waiver. This allowed the prosecution's reasons for striking black jurors to evade scrutiny. Step 3 scrutiny would have detected the prosecution's racially discriminatory peremptory strikes. Pitchford presented a strong prima facie case of discrimination at Step 1, and the prosecution's Step 2 response could not explain away this disparity.

II. Federal courts must remedy the state courts' gross *Batson* violation.

First, the Mississippi Supreme Court's denial of Pitchford's *Batson* claim on waiver grounds was based on an unreasonable determination of the facts under § 2254(d)(2). A state court's factual findings are unreasonable when the court ignores information that was obviously salient. *Brumfield* v. *Cain*, 576 U.S. 305, 316, 322 (2015); *Wiggins* v. *Smith*, 539 U.S. 510, 528 (2003). The Mississippi Supreme Court did just

that. Pitchford repeatedly raised his *Batson* claim, advising the trial court that it must resolve the four challenged strikes "on the basis of all relevant circumstances to racial discrimination." JA169. The trial court refused, and assured Steiner that Pitchford's *Batson* claim was preserved. JA175-176. The Mississippi Supreme Court's waiver finding disregards these facts. But no "fair-minded jurist" could find facts supporting waiver from Pitchford's repeated efforts to re-raise the objection and the trial court's assurance that it was preserved in the record. *E.g.*, *Harrington* v. *Richter*, 562 U.S. 86, 101 (2011).

Second, the Mississippi Supreme Court's interpretation of *Batson*'s third step involved an unreasonable application of this Court's clearly established law under § 2254(d)(1) in two different respects. To start, the Mississippi Supreme Court interpreted *Batson* to include a waiver rule that contradicts this Court's precedent, barring Pitchford from presenting his comparative juror analysis for the first time on appeal. But this Court has been clear: defendants must have a meaningful opportunity to rebut the prosecution's proffers by arguing that the proffered race-neutral explanations are pretextual, and appellate courts consider comparative juror analyses in the first instance when that opportunity is denied. *Miller-El* v. *Dretke*, 545 U.S. 231, 241-243 & n.2 (2005) (*Miller-El II*); *Snyder*, 552 U.S. at 477-484. The Mississippi Supreme Court endorsed a rule that this Court had rejected in *Miller-El II* and *Snyder*.

The Mississippi Supreme Court also improperly excused the trial court's failure to "assess all relevant circumstances" in determining whether the prosecution's strikes reflected intentional discrimination. The

trial court short-circuited *Batson*'s analysis, overruling Pitchford's objection based solely on the prosecution's Step 2 proffer—without any meaningful examination of that proffer, without providing any opportunity for Pitchford to rebut it, and without determining whether purposeful discrimination occurred. Because the Mississippi Supreme Court declined to cure this error by conducting a Step 3 analysis in the first instance, it should have at least identified the trial court's error and remanded to the trial court to permit rebuttal and make Step 3 determinations. *See Snyder*, 552 U.S. at 486. The court's failure to do so was unreasonable and deprived Pitchford of a state forum for fully airing his preserved *Batson* challenges.

III. Federal habeas relief is warranted. The state courts' *Batson* errors are severe and structural, requiring automatic reversal. *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009). Regardless of whether the Court's decision rests on subsection (d)(1) or (d)(2), the Court should remand for the entry of judgment requiring Pitchford to be released or retried. *Miller El II*, 545 U.S. at 240, 266.

ARGUMENT

I. THE STATE COURTS VIOLATED *BATSON*.

The record in this case reveals intentional discrimination by the prosecution during jury selection. The prosecution's peremptory strikes targeted black jurors. And the prosecution's explanations for these strikes were not credible. But the state courts failed to meaningfully scrutinize the prosecution's justifications, ignored compelling evidence of disparate treatment, and overlooked the prosecution's troubling history of discriminatory strikes. These failures, consid-

ered together, reveal a *Batson* violation that undermines the foundational promise of equal justice under law.

A. Legal Background

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008) (citation omitted). Were it otherwise, this Court has explained, the taint of racism would risk "undermin[ing] the very foundation of our system of justice." *Georgia* v. *McCollum*, 505 U.S. 42, 49-50 (1992) (citation omitted).

Batson "provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race." *Snyder*, 552 U.S. at 476-477. First, "a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Id.* (citation omitted). Second, "the prosecution must offer a race-neutral basis for striking the juror in question." *Id.* (citation omitted). Third, "in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Id.* (citation omitted).

Each of those steps represents a distinct analytical inquiry that requires the trial judge to determine whether to proceed with the next step. At Step 1, the question is whether the defendant can make a prima facie showing that "might give rise to an inference of discrimination." *Batson*, 476 U.S. at 96-97. Step 2 shifts the burden to the prosecution, requiring prosecutors to provide a legitimate reason for the challenged strikes. The sole "issue is the facial validity of the prosecutor's explanation"—*i.e.*, the trial court determines only whether "the reason offered" is "race

neutral." *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (per curiam) (citation omitted).

This case concerns the third—and, often, most critical—step. At Step 3, defendants must be given a meaningful opportunity to rebut the prosecution's proffer by arguing that the explanations were pretextual. *Flowers*, 588 U.S. at 302-303 (noting that a trial court must determine based on "all of the relevant facts and circumstances" including "the arguments of the parties"); *see also, e.g.*, *Miles* v. *State*, 346 So. 3d 840, 842-843 (Miss. 2022) (recognizing "reverse *Batson*" error where the state trial court deprived the State of "an opportunity to rebut" a defendant's race-neutral proffer).

Step 3 then requires trial courts to "assess the plausibility of th[e] [prosecutor's] reason in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 251-252. It is the court's "duty to determine," *id.* at 239 (citation omitted), after considering "*all of the circumstances* that bear upon the issue of racial animosity," *Snyder*, 552 U.S. at 478 (emphasis added), whether the defendant has "established purposeful discrimination," *Miller-El II*, 545 U.S. at 239 (citation omitted). "[A]ll of the circumstances that bear upon the issue of racial animosity" include, but are not limited to, a defendant's arguments that the State's race-neutral proffer was pretextual. *See Snyder*, 552 U.S. at 478-483.

When determining the existence of purposeful discrimination, courts rely on several guiding principles. *First*, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768. *Second*, courts are less inclined to credit the prosecution where

"the prosecution asked nothing further about" its purported concerns with an individual juror, suggesting those concerns did not "actually matter[]." *Miller-El II*, 545 U.S. at 246. *Third*, "[c]omparing prospective jurors who were struck and not struck" is also "an important step in determining whether a *Batson* violation occurred." *Flowers*, 588 U.S. at 311. That is, when "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve," courts treat that as "evidence tending to prove purposeful discrimination." *Foster* v. *Chatman*, 578 U.S. 488, 512 (2016) (quoting *Miller-El II*, 545 U.S. at 241). *Fourth*, judges "cannot ignore" a prosecutor's past "effort[s] to rid the jury of black individuals." *Flowers*, 588 U.S. at 306-307; *see also Miller-El II*, 545 U.S. at 263 (finding racial discrimination partly based on prosecution's policy of "systematically excluding blacks from juries").

The ultimate inquiry at Step 3 is a broad one. This Court has previously focused on implausible justifications, *Purkett*, 514 U.S. at 768, the failure to ask follow-up questions, *Miller-El II*, 545 U.S. at 246, juror comparisons, *Foster*, 578 U.S. at 512, and a recent track record of discrimination, *Flowers*, 588 U.S. at 306, but the Court has never suggested that those are the only relevant factors. Instead, this Court has instructed that courts reviewing *Batson* claims must assess whether there was purposeful discrimination "in light of *all evidence* with a bearing on it." *Miller-El II*, 545 U.S. at 251-252 (emphasis added).

All told, *Batson*'s third step requires trial courts to ask a simple question: Were the prosecution's proffered justifications credible or were the strikes otherwise shown to be purposeful discrimination?

B. The *Batson* Violations

The prosecution's proffered justifications were not credible here for many of the same reasons that this Court has highlighted in past cases, including juror comparisons, implausible justifications, the failure to question, the lack of support in the record for purportedly race-neutral reasons, and historical context. The prosecution's peremptory strikes of black prospective jurors were motivated by purposeful discrimination.

1. Pitchford presented a strong prima facie case that the prosecution made racially discriminatory peremptory strikes.

As in *Miller-El II*, "[t]he numbers describing the prosecution's use of peremptories are remarkable." 545 U.S. at 240. The county in which Pitchford was tried is 40% black, and the initial jury pool reflected that. Of the 126 registered voters in Grenada County who returned jury questionnaires, 40 were black, 84 were white, 1 was Hispanic, and 1 did not provide race information. JA575. After the trial court excused various venire members prior to voir dire, the pool had 96 potential jurors, comprising 60 white and 36 black venire members. ROA.2196-99. At voir dire, the parties then further narrowed the pool to 36 white and 5 black jurors by for-cause strikes. *Id.*

Evans then peremptorily struck 7 jurors, including 4 of the 5 eligible black prospective jurors and only 3 of the 36 white ones. This disparity—striking 80% of eligible black jurors and only 8.3% of eligible white ju-

rors—"raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El I*, 537 U.S. at 342. His strikes left a single black person on the jury, as in *Flowers* and *Miller-El II*. JA576; *see* JA166-174. "Happenstance is unlikely to produce this disparity." *Miller-El I*, 537 U.S. at 342.

2. The voir dire record illustrates that the prosecution's race-neutral proffers were pretextual.

Even "[m]ore powerful than * * * bare statistics" are the "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. Prosecutor Doug Evans declined to exercise his remaining peremptory strikes on white panel members sharing characteristics with several black members who were struck. He offered implausible reasons for strikes. And he omitted voir dire on his purported reasons for striking prospective jurors, and offered reasons lacking any record support. By the time Evans struck a fourth black venire member, Ward, the relevant circumstances surrounding Evans's strikes were clear, and they showed intentional discrimination.

Linda Lee. The prosecution claimed that it exercised a peremptory strike against Lee because she was 15 minutes late to the courtroom after walking back in inclement weather from the voir dire's lunch recess. JA169. But that reason was clearly pretextual. The prosecution did not object to the other late-returners who were also delayed by the weather. *See* JA163. Moreover, the prosecutor had earlier sought to strike Lee for cause due to her tardiness, which the trial

court specifically found was insufficient. *See id.* Indeed, the court commended Lee for "trying real hard to be here and fulfill her civic duty as a juror" by overcoming logistical hurdles to appear for voir dire. *Id.*; *see Snyder*, 552 U.S. at 479-483 (finding peremptory strike pretextual where prosecution's fears that juror's student-teaching responsibilities would interfere with jury service were unfounded).

After the court rejected the prosecution's assertion that Lee's lateness would affect her ability to serve, the court afforded the parties 20 minutes to prepare their respective peremptory strikes. JA163. The prosecution used the break to concoct a new reason for striking Lee: according to a "police captain," Lee "has mental problems" which have resulted in "numerous calls to her house." JA169.

The prosecution's mental-health allegation is even less plausible than the tardiness excuse. The State did not raise this potentially disqualifying condition when it first tried to strike Lee for cause for being late to court, and never asked her about it during voir dire. JA163. That the prosecution needed extra time to come up with that justification for striking Lee makes its post-break proffer "reek[] of afterthought." *Miller-El II*, 545 U.S. at 246. And the prosecution presented no evidence to support its proffer or individually voir dire Lee about its purported concerns.

Christopher Tillmon. Tillmon possessed attractive qualities for a capital prosecution. His questionnaire indicated he previously worked for a correctional facility, and—like two white jurors who were accepted by the prosecution—"strongly" favored the death penalty. *Compare* JA1444-1447 (capitalization

altered), *with* JA910-915, JA1372-1377; *see also Miller-El II*, 545 U.S. at 265 (considering qualities that should have made a struck juror "acceptable to prosecutors seeking a death verdict," or even "ideal").

Evans claimed he struck Tillmon because his questionnaire stated his brother had been convicted of manslaughter, and the prosecution did not "want anyone on the jury that has relatives convicted of similar offenses." JA169-170. But the prosecution chose not to strike two white venire members—one of whom was seated—who also stated that they had relatives with felony convictions. The prosecution's acceptance of other, similarly situated jurors, paired with its failure to question those venire members about the nature of these felonies, when they were committed, or the venire members' relationship with the convicted relative, supports a finding of pretext. *See Miller-El II*, 545 U.S. at 246 (explaining that prosecution "probably would have" asked further questions about family history "if the family history had actually mattered").

By contrast, one of the white jurors who had a relative with a felony conviction—and who was ultimately seated—lacked any law-enforcement connections and only "generally" favored the death penalty. JA928-933 (capitalization altered). The prosecution's decision to strike Tillmon and seat that white juror suggests that race was the overriding determinant for the strike. *Miller-El II*, 545 U.S. at 265.

Patricia Tidwell. The prosecution's reasons for striking Tidwell suffer from similar infirmities.

As with Tillmon, the prosecution invoked her relatives' criminal history. In particular, the prosecution claimed to strike Tidwell because her brother was convicted of sexual battery and was charged in a shooting

case. JA170. But, again, the prosecution did not strike white venire members who also had relatives convicted of serious crimes, and Tidwell's statement on her questionnaire that her brother had been convicted of a felony must be viewed in that light. JA1426-31; *see Miller-El II*, 545 U.S. at 241 (failure to strike white jurors with similar characteristic as stricken black juror is evidence of discrimination). Indeed, the fact that the prosecution twice cited relatives' criminal histories as reasons for striking black jurors, while declining to strike—and ultimately seating—white jurors who share that characteristic is evidence of discrimination. *See Snyder*, 552 U.S. at 478 (noting that any "persisting doubts" as to discriminatory intent regarding one challenge must be considered "for the bearing it might have" on the next challenge, and the one after).

And as with Lee, the prosecution offered unsubstantiated interactions between Tidwell and the police. The prosecution alleged that Tidwell is a "known drug user." JA170. The record suggests otherwise; Tidwell's questionnaire stated that she had never "been a party to a legal action," JA1428, and someone "known" to the police as a "drug user" would likely have been charged with a drug-related crime in the past. Indeed, the prosecution offered no evidence of Tidwell's alleged drug use and asked her no questions about it. In light of the prosecution's failure to substantiate that serious claim, it is hard to believe that the prosecution's reasons were genuine. *See Miller-El II*, 545 U.S. at 246 (failure to voir dire about cited reason suggests discrimination).

Carlos Ward. Considering the foregoing three challenges in assessing the prosecutor's final one, *Snyder*,

552 U.S. at 478, the ulterior discriminatory motives behind the strike of Carlos Ward are obvious. The prosecution claimed that it struck Ward because of his demographic profile, his opinion on the death penalty, and his alleged speeding violations. But none of those reasons distinguished Ward from the white venire members who were allowed to serve on the jury.

On demographics, the prosecution said that Ward was "too closely related to the defendant" as an unmarried father of a young child, noting that Ward had indicated on his juror form that he had a two-year-old child and had never been married. JA170. But the prosecution accepted eleven white venire members sharing at least one of those characteristics. Seven white venire members had young children, and five were unmarried—yet the prosecution struck none of them. *See* JA1450-55 (young child); JA1293-98 (same); JA1468-73 (same); JA1498-1503 (same); JA953-958 (same); JA1221-26 (same); JA1372-77 (same); *see also* JA1372-77 (unmarried); JA1003-09 (same); JA997-1002 (same); JA928-933 (same); JA1408-13 (same); JA838-843 (same). Indeed, *six* of the white venire members shared more than one of the characteristics that the prosecution said made Ward undesirable. JA1372-77 (similar age and has young children); JA1003-09 (similar age and unmarried); JA1468-73 (has young children and no opinion on the death penalty); JA1450-55 (has young children and no opinion on the death penalty); JA1293-98 (similar age and has young child); JA1498-1503 (similar age and has young child); *see also Miller-El II*, 545 U.S. at 241 (failure to strike white jurors with similar characteristic as stricken black juror is evidence of discrimination).

The prosecution's stated objections to Ward's view of the death penalty fare no better. Ward's jury questionnaire indicated that he had "no opinion" on the death penalty. JA1462-67 (capitalization altered). "No opinion" was the middle of five choices on the jury questionnaire—meaning that Ward did not describe himself as "strongly against," or even "generally against," the death penalty. *Id.* (capitalization altered). Moreover, Ward's "no opinion" response was shared by two white jurors whom the prosecution accepted, both of whom also had young children—the very trait the prosecution supposedly found troubling about Ward. JA1450-55, JA1468-73. One of those white jurors was seated and the other served as an alternate. JA174-175.

The prosecution's final reason for striking Ward—his speeding violations—is suspect, especially given the rest of voir dire. First, the prosecution itself had earlier disclaimed the view that speeding violations are even relevant to jury service, and the jointly crafted jury questionnaire specifically excluded traffic violations from its question about prospective jurors' criminal charges and convictions. JA733-739; Tr. 4. Further, the prosecution introduced no evidence of Ward's purported speeding violations. Nothing in the record suggests that the prosecution sought information regarding traffic violations of any other jurors. *See Snyder*, 552 U.S. at 483 (rejecting an "implausib[le]" reason as "suspicious").

3. Evans exhibited a history of discrimination.

The prosecution's use of racially discriminatory strikes was part of a pattern of racial discrimination. Indeed, this case involves the same lead prosecutor, Doug Evans, whom this Court has previously found

exhibited "a blatant pattern of striking black prospective jurors." *Flowers*, 588 U.S. at 305.

Three years before the Mississippi Supreme Court issued the decision on review here, that court decided the appeal from Evans's third trial of Curtis Flowers, conducted two years, almost to the day, before Pitchford's trial. *Flowers* v. *State*, 947 So. 2d 910, 916 (Miss. 2007) (*Flowers III*). There, the prosecution had "exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors." *Flowers*, 588 U.S. at 290. The Mississippi Supreme Court opined that Evans's racially motivated strikes "present[ed] [the court] with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So. 2d at 935. Across six trials and retrials of Flowers, Evans removed 41 of 42 black jurors. *Flowers*, 588 U.S. at 288. In reversing Flowers's conviction following his sixth trial, this Court found that Evans had engaged in "extraordinary" and "blatant" misconduct and evinced a "relentless, determined effort to rid the jury of black individuals." *Flowers*, 588 U.S. at 305, 306, 315-316.

Here, as in *Flowers*, Evans's peremptory strikes left only one black juror on the panel. *See Flowers III*, 947 So. 2d at 917-918. That, too, is part of the playbook; this Court has "skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors." *Flowers*, 588 U.S. at 307 (quoting *Miller-El II*, 545 U.S. at 250).

II. THIS COURT MUST REMEDY THE *BATSON* VIOLATIONS BECAUSE THE MISSISSIPPI SUPREME COURT'S WAIVER RULING WAS AN UNREASONABLE DETERMINATION OF FACT AND LAW.

Section 2254(d) imposes certain "threshold restrictions" on habeas corpus relief. *See, e.g.*, *Renico* v. *Lett*, 559 U.S. 766, 773 n.1 (2010) (citing cases). This clear *Batson* violation nonetheless requires relief. First, the Mississippi Supreme Court's denial of Pitchford's *Batson* claim on waiver grounds was based on an unreasonable determination of the facts, under § 2254(d)(2). No fair-minded jurist could find facts supporting waiver when the state trial court gave Pitchford's counsel no opportunity to rebut the proffers and then thwarted further attempts to address those justifications. Second, the Mississippi Supreme Court's interpretation of *Batson*'s third step is an unreasonable application of this Court's clearly established law under § 2254(d)(1). The state court unreasonably applied this Court's precedents by applying a *Batson*-waiver rule to avoid conducting Step 3 of Pitchford's preserved *Batson* claim.

A. The Mississippi Supreme Court's waiver finding is an unreasonable determination of fact.

Section 2254(d) "pose[s] no bar to granting petitioner habeas relief," where, as here, a state court "base[s] its conclusion, in part, on a clear factual error." *Wiggins*, 539 U.S. at 529. Clear factual errors exist here and drove the Mississippi Supreme Court's waiver determination.

1. Pitchford pressed and preserved his Batson *challenge.*

Despite the clear record of the prosecution's racially discriminatory strikes, no state court ever engaged with the merits of Pitchford's *Batson* claim. That was not for Pitchford's lack of trying. After the prosecution struck the fourth of five black prospective jurors, Pitchford's counsel, Steiner, timely objected. JA167-169. The trial court properly found that Pitchford made a prima facie case of discriminatory jury selection and required the prosecution to give reasons for those strikes. *Id.* Steiner argued that the court's *Batson* ruling must be "a determination on the basis of all relevant circumstances." JA169; *see Flowers*, 588 U.S. at 305; *Batson*, 476 U.S. at 96-97. But the court never conducted that Step 3 analysis, and prevented Steiner from making any record-based rebuttal that could inform any determination by the court. Indeed, Steiner raised the objection three separate times before Pitchford's conviction became final.

First, Steiner attempted to make a complete *Batson* record during the prosecution's peremptory strikes. After she made out a prima facie case, the trial court asked the prosecution whether it had race-neutral justifications for the jurors it struck. JA167-169. Defense counsel reminded the court that—regardless of what the prosecution said in its proffer—the court would ultimately have to "make a determination on the basis of all relevant circumstances to racial discrimination" at *Batson* Step 3. JA169. The court's response: "I'll have the State give race neutral reasons." *Id.*

And that is what the trial court did. Following each of Evans's four proffers, the court deemed the reasons given "race neutral," then moved to the next strike.

See, e.g., JA169 (juror 30, Lee) ("That would be race neutral as to—as to that juror."); JA169-170 (juror 31, Tillmon) ("I find that to be race neutral. And you can go forward."); JA170 (juror 43, Tidwell) ("I find that to be race neutral."); *id*. (juror 5, Ward) ("The Court finds that to be race neutral as well.").

Unfortunately, hearing the prosecution's race-neutral reasons is *all* that the court did. The court pivoted directly from its fourth finding of race neutrality to the parties' remaining strikes. JA170 ("So now we will go back and have the defense starting at 37."). Steiner took the court's instruction, returning to the peremptory strikes. JA170-174. The trial court then seated the 12-member jury and two alternates and dismissed the venire, cutting off Steiner's timely *Batson* challenge. *See* JA173-176; *see also Gaskin* v. *State*, 873 So. 2d 965, 968-969 (Miss. 2004) (collecting cases).

The trial court failed to provide Pitchford's counsel with a meaningful opportunity to make her rebuttal during jury selection. Indeed, the trial court's immediate shift from the prosecutor's Step 2 proffers to the remainder of jury selection departed from standard *Batson* practice within the state. *See Johnson* v. *California*, 545 U.S. 162, 173-174 (2005) (Thomas, J., dissenting) (leaving it to state courts to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" (quoting *Batson*, 476 U.S. at 99-100)). The Mississippi Supreme Court had long recognized that a meaningful opportunity to rebut the prosecution's Step 2 proffer is a prerequisite to applying the state's *Batson*-waiver rule. *See* Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 Yale L.J. 187, 189-190, 193

n.44, 197-198 (1989) (citing *Williams* v. *State*, 507 So. 2d 50, 53 (Miss. 1987)) (explaining that trial courts should "allow[] the defense to rebut the prosecution's reasons before the court decides whether to allow the peremptory challenge in question"); *see also, e.g.*, *Berry* v. *State*, 703 So. 2d 269, 295 (Miss. 1997) (defendant "will be afforded the opportunity to challenge and rebut" prosecutor's proffered reasons). But even as the trial court withheld this rebuttal opportunity from Steiner, she did not drop Pitchford's *Batson* claim. *See* JA167-168, JA175-176. Further, imputing a third step to the trial court, while unsupported by this record, would leave no room for argument as to the denial of any opportunity to rebut the Step 2 proffers.

Second, Steiner re-raised the *Batson* objection at the conclusion of the jury selection process, to try to force the missing Step 3 analysis. *See* JA175-176. Counsel reminded the court that she "want[ed] to [p]reserve" the "*Batson* objection." *Id*. And the trial court refused to hear more, stating "You have already made [the objection] in the record so I am of the opinion it is in the record." *Id.* Counsel pressed her position, emphasizing that she did not want "the paneling of the jury [to] go by without having those objections," and reciting the racial makeup of the seated jury and the approximate composition of the county. *Id.* The court simply directed the parties to proceed to trial.

After trial, Pitchford's counsel took even further steps to re-ensure preservation, re-raising Pitchford's *Batson* claim in a motion for a new trial. JA184. The motion reiterated that the prosecution's targeted striking of black jurors was in "clear violation of *Batson* and *Miller-El*," particularly where the prosecution

"deselected black people from the jury panel who had the same familial, living, social or marital circumstances as whites who were not deselected." *Id.* The trial court again declined to conduct a *Batson* hearing at this juncture, denying the motion summarily. JA3. The motion eliminated any doubt that a comparative juror analysis was integral to the Step 3 inquiry that the trial court bypassed.

Third, Steiner re-raised Pitchford's *Batson* objection on direct appeal. JA200-225. Pitchford's opening brief on appeal spelled out his *Batson* challenge in more detail, including comparative juror analysis. Pitchford insisted that *Batson* required the trial court to "assess the plausibility" of the prosecution's race-neutral proffer "in light of all evidence with a bearing on it." JA204 (quoting *Miller-El II*, 545 U.S. at 252). Here, the evidence reflected an empaneled jury that was "significantly different from the racial makeup of the population of Grenada County," JA209; a comparative juror analysis suggestive of race-driven strikes, JA209-225; and a prosecutor who had "previously been held by [the Mississippi Supreme Court] to have engaged in racially discriminatory jury selection practices," JA202. Pitchford's reply brief, too, pressed Pitchford's *Batson* challenge in full and rebutted any suggestion of waiver. JA479-487.

2. The Mississippi Supreme Court ignored salient facts in the record to find Pitchford waived argument on his Batson *challenge.*

The Mississippi Supreme Court nonetheless rejected Pitchford's *Batson* challenge; on its view of the record, Pitchford "provided the trial court no rebuttal" to the prosecution's proffered race-neutral reasons for striking nearly every prospective black juror, and

would "not now fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence." JA584-585. By resting its decision on waiver grounds, the Mississippi Supreme Court necessarily found "an intentional relinquishment or abandonment" of Pitchford's right to rebut the prosecution's race-neutral proffer. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). That factual determination is "objectively unreasonable" several times over. *Miller-El I*, 537 U.S. at 340-341.

First, the findings underlying the Mississippi Supreme Court's waiver determination ignore Pitchford's three thwarted attempts to elaborate on his *Batson* challenge. AEDPA requires courts to presume that the state court's factual findings are sound unless, as here, it can be shown that the state court disregarded obviously salient information. *See, e.g.*, *Brumfield*, 576 U.S. at 315-316, 322 (state court's disregard of evidence showing intellectual disability reflected "an unreasonable determination of the facts"); *Wiggins*, 539 U.S. at 528 (state court's "incorrect" assumption about the contents of relevant records resulted in an "unreasonable determination of the facts" (citation omitted)).

Pitchford made that showing here. The Mississippi Supreme Court disregarded information that was obviously relevant: Pitchford's repeated attempts to rebut the race-neutral proffers before the trial court. Those facts cannot be characterized as a "waiver."

"Waiver," this Court has repeatedly explained, "is the intentional relinquishment or abandonment of a known right." *Morgan* v. *Sundance, Inc.*, 596 U.S. 411, 417 (2022) (quoting *United States* v. *Olano*, 507 U.S.

725, 733 (1993)). Waiver requires a party to *affirmatively* abandon a legal right—a mere "failure to raise the argument in the District Court" is generally insufficient. *Puckett* v. *United States*, 556 U.S. 129, 138 (2009). And courts "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (citation and quotation marks omitted).

It is inconceivable that anyone in the courtroom doubted Pitchford's intent to preserve his *Batson* objections, yet the Mississippi Supreme Court disregarded the trial court's refusal to hear Pitchford's Step 3 arguments. Plainly, Pitchford did not intentionally abandon anything; rather, the trial court thwarted his attempts to assert his federal rights. This disregard of the record renders the Mississippi Supreme Court's waiver determination unreasonable.

Second, the factual findings underlying the Mississippi Supreme Court's waiver determination are objectively unreasonable because they contradict the trial court's explicit finding that Pitchford preserved his *Batson* challenge. When Pitchford's counsel sought to address the prosecution's race-neutral justifications for its strikes, the trial court responded that Pitchford's objections were already preserved: "You have already made it in the record so I am of the opinion it is in the record." JA175.

The Mississippi Supreme Court "had before it, and apparently ignored" that unequivocal ruling. *Miller-El I*, 537 U.S. at 346. The direct contradiction between the record and the Mississippi Supreme Court's findings render those findings unreasonable in light of this Court's precedent. *See Wiggins*, 539 U.S. at 528-

529 (factual determination unreasonable where it contradicted the record).

The unreasonableness of the Mississippi Supreme Court's waiver finding is exacerbated by the grave unfairness caused. As this Court has explained, "the job of enforcing *Batson* rests first and foremost with trial judges," who "operate at the front lines" of criminal trials and are best suited to "prevent racial discrimination from seeping into the jury selection process." *Flowers*, 588 U.S. at 302. The trial court purported to carry out that role when it overruled Pitchford's *Batson* objection but assured Steiner that the objection was "clear in the record"—and counsel reasonably did not attempt further argument to a judge who had expressly said that no further argument would be permitted, and who had said the objection was preserved. *See* JA175. The Mississippi Supreme Court's after-the-fact waiver invocation unfairly penalizes Pitchford's reasonable reliance on the trial court's ruling.

Third, the Mississippi Supreme Court's waiver determination is unreasonable given that Pitchford demonstrated his intent to preserve his *Batson* challenge as a whole by proving a prima facie case of intentional discrimination. The trial court rightly determined that Pitchford satisfied his Step 1 burden under *Batson* "given the number of black jurors that were struck." JA168. The Mississippi Supreme Court agreed, explaining it was "persuaded that the record supports the trial court's finding of a prima facie showing of discrimination." JA580. The Mississippi Supreme Court's acknowledgement that Pitchford made out a prima facie case should have prevented

that court from finding that Pitchford failed to adequately preserve his ability to argue, from the record, his *Batson* claim.

That is, the Mississippi Supreme Court's waiver finding rested on an assumption that Pitchford needed to do *more* than make a prima facie showing of discrimination before the trial court was required to consider "all of the circumstances that bear upon the issue of racial animosity." *Foster*, 578 U.S. at 501 (citation omitted); *see* JA584-585. That assumption defies this Court's precedent, which acknowledges that appellate courts conduct comparative juror analysis that is based on the record before the trial court, even where the trial court was not able to conduct that analysis in the first instance. *See, e.g.*, *Miller-El II*, 545 U.S. at 241-243 & n.2 (explaining that its comparative juror analysis was proper even though the comparisons were not pressed before the trial court); *Snyder*, 552 U.S. at 483-484 (comparing struck venire member with two white jurors even though the defendant had not pressed this comparison in the trial court). After all, "trial courts are not always situated to stop the proceedings and conduct the kind of formal comparative juror analysis the Court conducted in *Miller-El*." *Murray* v. *Schriro*, 745 F.3d 984, 1005 (9th Cir. 2014); *accord United States* v. *Atkins*, 843 F.3d 625, 637 (6th Cir. 2016) (explaining that mid-trial comparative juror analysis "is clunky and impractical").

Because it fails to acknowledge that comparative juror analysis can properly be done for the first time on appeal, the Mississippi Supreme Court's waiver finding is an unreasonable determination of fact. *See Wiggins*, 539 U.S. at 528-529 (factual determination

"pose[s] no bar to granting petitioner habeas relief" when premised on unreasonable application of Supreme Court precedent).

For each of these reasons, federal relief under § 2254(d)(2) is available here, where the state court's adjudication "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

3. The Fifth Circuit's selective view of the record entrenches the state courts' unreasonable finding.

The federal district court recognized, and attempted to remedy, the Mississippi courts' unreasonable determinations. The district court found that "there was no waiver by Pitchford" since "Pitchford *did* object to the explanations provided [by the prosecution] when he raised the [*Batson*] issue again and confirmed it was on the record." JA704. But the Fifth Circuit reversed that ruling, concluding that Pitchford's arguments were "not remotely sufficient to raise an objection to the State's race-neutral reasons." JA727.

The Fifth Circuit's conclusion reflects the same unreasonable view of the record that drove the Mississippi Supreme Court's decision. Indeed, the Court of Appeals deferred so heavily to the state supreme court's waiver determination that it did not even acknowledge the need to evaluate the prosecution's strikes against "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. The Fifth Circuit likewise ignored that the state trial court denied Pitchford the opportunity to argue pretext—both by refusing to hear argument on the matter and by assuring Pitchford that the issue was preserved. *See* JA175-176.

The Fifth Circuit's myopic view of the voir dire proceedings betrays the unreasonableness of finding waiver on this record. Preservation rulings are enormously consequential and, in capital cases like this one, can be the difference between life and death. If litigants are unable to rely on a trial court's express ruling that an issue is preserved, they will (sensibly) re-litigate every angle of every objection raised throughout trial—at the risk of being found to have intentionally abandoned an argument despite having been reassured by the trial court it is preserved. This would burden overextended trial courts, complicate trial proceedings, and undermine confidence in trial-court rulings across the board without any apparent benefit. Nothing in this Court's precedent permits such an untenable result.

B. The Mississippi Supreme Court's Waiver Ruling Unreasonably Applies Clearly Established Federal Law.

The Mississippi Supreme Court's waiver ruling also "involved an unreasonable application of * * * clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Specifically, the Mississippi Supreme Court unreasonably applied *Batson* in multiple ways. *First*, the state court barred comparative juror analysis on appeal because the defendant was deemed not to have ventilated those comparative arguments at trial, contrary to this Court's precedent. *See, e.g.*, *Snyder*, 552 U.S. at 483-484; *Miller-El II*, 545 U.S. at 241-253 & n.2. *Second*, the Mississippi Supreme Court's waiver finding deprived Pitchford of any state forum to consider all three steps of his *Batson* claim. This separately runs afoul of this Court's clear precedent. *See, e.g.*, *Snyder*, 552 U.S. at 476-477.

1. This Court has clearly established that appellate courts consider comparative juror analyses pressed for the first time on appeal.

In adjudicating *Batson* Step 3, appellate courts consider comparative juror analyses drawn from the trial-court record—even if the defendant did not present such comparisons at trial. *See Miller-El II*, 545 U.S. at 241-253 & n.2; *Snyder*, 552 U.S. at 477-485. The Mississippi Supreme Court's *Batson*-waiver rule, as applied and explained in this case on direct appeal, applies *Batson* differently, categorically *prohibiting* comparative juror analysis absent an "actual proffer" of comparisons at the state trial court. *See* JA581-585 & nn.16-17 (collecting cases). As a result, the Mississippi Supreme Court bars the very review this Court has repeatedly undertaken both in assessing pretextual proffers with respect to a given challenge, and the totality of circumstances of purposeful discrimination bearing upon a prosecution's multiple challenged strikes.

a. *Snyder* v. *Louisiana* pre-dated the Mississippi Supreme Court's decision in this case and made clear that appellate courts conduct comparative juror analyses even when not pressed at trial. In *Snyder*, this Court held that the prosecutor's justification for striking a black juror was pretextual because the prosecutor had accepted comparable "white jurors." 552 U.S. at 482-484. The Court reached this conclusion based on juror comparisons that were presented to the Louisiana Supreme Court, *id.* at 483 n.2 (citing *State* v. *Snyder*, 942 So. 2d 484, 495-496 (La. 2006)), but "never mentioned * * * in the argument before the trial court," *id.* at 489 (Thomas, J., dissenting). *Snyder*

acknowledged "that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial," but recognized that would not *always* be the case. *Id.* at 483. In *Snyder*, for example, the cold record was not misleading because the prospective jurors' "shared characteristic" was evident on the face of the record. *See id.*

The juror comparisons that Pitchford pressed are similarly straightforward. Setting aside the race-neutral justifications that the prosecution spun from thin air, *supra* at pp. 23-28, each of the prosecution's proffers stemmed from the same juror questionnaires that Pitchford relied upon for his comparative juror analysis, *supra* at pp. 8-9. Thus, the Mississippi Supreme Court was not called on to second-guess a trial court's credibility determinations—it need only compare the prosecution's stated reasons for its strikes with the questionnaires that the prosecution purported to rely upon. *See* JA207-223 (Pitchford's comparative juror analysis). The Mississippi Supreme Court instead ignored that it had authority to conduct a comparative juror analysis at all. JA584-585. "[N]o fairminded jurist would agree" that this abdication of authority is consistent with *Snyder*. *Andrew* v. *White*, 604 U.S. 86, 92 (2025) (per curiam).

Miller-El II further proves the point. 545 U.S. at 241 n.2. There, this Court performed juror comparisons in a case wherein such analysis was conducted for the first time on appeal in the Fifth Circuit, from the Northern District of Texas. *Id*. at 256 n.15, 278. *Miller-El II* considered whether the prosecutor's "proffered reason for striking a black panelist applie[d] just as well to an otherwise-similar nonblack [panelist]

who [was] permitted to serve." *Id.* at 241. In reversing the Fifth Circuit, this Court held that the defendant was not required to "put before" the state trial court the "comparisons of black and nonblack venire panelists" to preserve the comparative analysis for appeal. *Id.* at 241 n.2.

In fact, *Miller-El II* considered and explicitly rejected the contrary view pressed in dissent: that the defendant's comparative juror analysis was "not properly before this Court" because it was pressed for the first time during habeas proceedings before the federal court of appeals. *Id.* The defendant had not conducted a comparative analysis before any state court—not the trial court, not on direct appeal—nor had the defendant raised these arguments before the federal district court in his initial habeas proceedings. *Id*. at 256 n.15; *see id.* at 278 (Thomas, J., dissenting).

This Court nonetheless refused to "conflate[] the difference between *evidence* that must be presented to the state courts to be considered by federal courts in habeas proceedings and *theories* about that evidence." *Id.* at 241 n.2 (emphases added). The comparative analysis was proper on appeal, the Court reasoned, because the defendant "fairly presen[ted] his *Batson* claim to the state courts," and "the transcript of *voir dire*, recording the evidence on which [the defendant] base[d] his arguments and on which [the Court] base[d] [its] result, was before the state courts." *Id.* (citation and quotation marks omitted).

Pitchford therefore did what was required to preserve his *Batson* claim for appeal. He "fairly presen[ted] his *Batson* claim" to the trial court, and his analysis rests on evidence in the record "before the state courts." *Id.* at 241 n.2 (citation and quotation

marks omitted). Although he was thwarted from presenting the trial court with precise "comparisons of black and nonblack venire panelists" that were able to be pressed on appeal, this Court has held that appellate courts can consider such comparisons in the first instance. *Id.*

b. "[N]o fairminded jurist would agree" with the Mississippi Supreme Court's contrary position. *Andrew*, 604 U.S. at 92. That court's *Batson*-waiver rule is tantamount to a waiver principle this Court considered and rejected in *Miller-El II*. 545 U.S. at 241 n.2.

The Mississippi Supreme Court refused to consider the comparative juror analysis pressed in Pitchford's appeal because it was not first presented to the trial court. JA584-585 & n.17. The court maintained (based on decisions long pre-dating *Miller-El*) that, without an "actual proffer" of such analysis "by the defendant" in the trial court, an appellate court "*may not* reverse on this point." JA584 n.16 (quoting *Woodward* v. *State*, 726 So. 2d 524, 533 (Miss. 1997)) (emphasis added); *accord Sudduth* v. *State*, 562 So. 2d 67, 71 (Miss. 1990).

That is an objectively unreasonable application of federal law—indeed, it is precisely the opposite of what this Court has held. Moreover, the trial court and Mississippi Supreme Court were well-aware of *Miller-El II* when they chose to defy it. Pitchford invoked the case by name when he made his first *Batson* objection in trial court. JA167-168. He did so again on appeal, urging the Mississippi Supreme Court to account for comparisons that appeared on the face of the record. JA204-210, JA485.

c. Correcting the Mississippi Supreme Court's unreasonable application of federal law does not, as the

Fifth Circuit opined, create a "requirement that a state court conduct a comparative juror analysis * * * *sua sponte*." JA728-729 (citation omitted and emphasis omitted). The "*sua sponte*" rule the Fifth Circuit rejected is also one the Fifth Circuit invented. As Pitchford repeatedly explained, he asserted before every court in the state proceedings that the prosecution's proffered reasons for its strikes were pretextual. *See supra*, at pp. 31-34. During voir dire, Pitchford argued that his *Batson* claim required the trial court to consider "all relevant circumstances," JA169, and was turned away when he tried to explain those circumstances, JA175-176. He pressed that argument post-trial, JA179, JA184, and then again on appeal, where he detailed the juror comparisons that were suggestive of pretext, JA209-225. Nothing in those arguments required the Mississippi Supreme Court to "*sua sponte*" conduct its own analysis.

Nor could Pitchford have presented a long-form juror analysis any sooner. Even setting aside the trial court's abruptly abridged process and the dismissal of the venire immediately upon the jury and alternates' selection, the voir dire stage, under this record, does not offer a realistic opportunity for defense counsel to draw granular comparisons between the non-white venire members stricken by the prosecution and the white jurors the court seated. Jury selection in this case involved a 126-member initial jury pool, 564 pages of juror questionnaires, 189 pages of voir dire testimony, and only a 20-minute period for counsel to analyze that information and decide how to use their limited strikes. *See generally* JA5-176 (voir dire testimony), JA163, JA575, JA733-1545 (juror questionnaires). This culminated in a breakneck peremptory-strike process—including the *Batson* challenges' two

steps and judge's decision—spanning less than ten transcript pages. *See generally* JA733-1545 (juror questionnaires), JA166-175 (trial transcript). Requiring defense counsel to present a real-time comparative juror analysis with the level of specificity that Pitchford presented on appeal would re-impose the same "insurmountable" burdens to proving discrimination that *Batson* sought to eliminate. *Batson*, 476 U.S. at 92 & n.17; *accord Flowers*, 588 U.S. at 297; *see also Foster*, 578 U.S. at 502 (examining discriminatory-intent evidence developed during both a "pretrial hearing" and a "new trial hearing"). Mississippi's attempt to resurrect the type of barrier that *Miller-El II* denounced is unreasonable and warrants habeas relief.

2. The Mississippi state courts contravened Supreme Court precedent by improperly truncating the Batson *analysis.*

The Mississippi Supreme Court also unreasonably applied federal law by excusing the trial court from its burden at Step 3 to provide Pitchford an opportunity to rebut the prosecution's race-neutral proffer and then determine, based on all relevant circumstances, whether the prosecution's strikes reflect intentional discrimination. The trial court deemed the *Batson* record complete after concluding at Step 2 that the prosecution had identified race-neutral reasons for the strikes that Pitchford challenged. But *Batson* requires more, including a meaningful rebuttal opportunity for the defendant and a finding by the trial court on whether the prosecution's proffer was credible or reflected intentional discrimination. The state supreme

court's affirmance of the trial court's truncated inquiry is an unreasonable application of this Court's precedents.

This Court has for three decades explained *Batson*'s "three-step" process "for a trial court to use in adjudicating a claim that a peremptory challenge was based on race." *Snyder*, 552 U.S. at 476; *see also, e.g.*, *Johnson* v. *California*, 545 U.S. 162, 168 (2005) (noting that the "three *Batson* steps should by now be familiar"); *Rice* v. *Collins*, 546 U.S. 333, 338 (2006) ("A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry"); *Foster*, 578 U.S. at 499 ("Our decision in [*Batson* v. *Kentucky*] provides a three-step process for determining when a strike is discriminatory."); *Davis* v. *Ayala*, 576 U.S. 257, 270 (2015) ("When adjudicating a *Batson* claim, trial courts follow a three-step process."); *Hernandez* v. *New York*, 500 U.S. 352, 358 (1991) (plurality op.) ("In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause."); *Purkett*, 514 U.S. at 767 ("step one," "step two," "step three").

Moreover, this Court has been clear about what *Batson*'s third step requires. "[I]n considering a *Batson* objection, * * * all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (citing *Miller-El II*, 545 U.S. at 239). And all means all. In *Snyder*, for example, this Court explained that in cases involving multiple *Batson* challenges, "considering * * * all of the circumstances that bear upon the issue of racial animosity" means that trial courts cannot consider each challenge in a silo. *Id.* "[I]f there were persisting doubts as

to the outcome [of one challenge], a court would be required to consider the strike of [a second venire member] for the bearing it might have upon the strike of [the former challenged venire member]." *Id.* And *Miller-El II* explained that trial courts must consider any other "clue[s] to the prosecutors' intentions," including a prosecutor's known practice of "excluding blacks from juries." 545 U.S. at 253, 263.

The trial court, however, stopped its analysis at Step 2, without providing Pitchford an opportunity to rebut the prosecutor's stated reasons and without considering, based on all relevant circumstances, whether the prosecution engaged in purposeful discrimination for any of its challenged strikes. Although Pitchford made a prima facie showing of discrimination for twice as many challenges as existed in *Snyder*, the trial court said nothing about the effect that each of Pitchford's strikes had on each other. JA169-173. Nor did the trial court give Pitchford an opportunity to present argument on how the trial court should consider those facts. By abdicating these Step 3 obligations, the trial court refused to do what this Court's clear precedent requires. *Snyder*, 552 U.S. at 478 (*Batson* requires consideration of "all of the circumstances that bear upon the issue of racial animosity").

The Mississippi Supreme Court could have cured either *Batson* error simply by using the same procedures that it has used for prior violations: conduct the Step 3 analysis that the trial court omitted, *e.g.*, *Gary* v. *State*, 760 So. 2d 743, 748-749 (Miss. 2000), or remand to the trial court to conduct a *Batson* hearing, *e.g.*, *Manning* v. *State*, 735 So. 2d 323, 341 (Miss. 1999); *see also supra*, at pp. 41-46. The court's waiver

finding instead entrenched the error, depriving Pitchford of any state forum to consider *Batson*'s critical third step. *See Purkett*, 514 U.S. at 767-768 (explaining that determining whether "the reason offered" is "race-neutral" satisfies only Step 2 of *Batson* (citation omitted)). As a result, no state court ever decided whether to credit the prosecutor's stated reasons, and "determin[e]" whether intentional discrimination had been proven. *Miller-El II*, 545 U.S. at 251-252; *see also* JA700-701. As the district court found, ending the *Batson* analysis "full-stop" after only completing Step 2 is an unreasonable application of federal law. JA700-701.

The Fifth Circuit hypothesized that "the trial court implicitly found no discrimination" at *Batson* Step 3 when the trial court "announced that it finds there to be no *Batson* violation." JA724-725 (quotation marks omitted). But nothing in the record supports the existence of such an "implicit finding." The state trial court had just brushed aside Pitchford's argument that the trial court had to consider his objection "on the basis of all relevant circumstances." JA169. The trial court moved on from Pitchford's objection immediately upon finding the prosecution's proffers "race neutral." And the trial court deemed the *Batson* record complete—and refused further argument—even though Pitchford was denied any opportunity to rebut the prosecution's proffer. The only fair reading of this record is that the trial court short-circuited *Batson*'s test.

Indeed, this Court has previously declined to presume the existence of a discrete Step 3 ruling where "the record does not show that the trial judge actually made a determination." *Snyder*, 552 U.S. at 479. In *Snyder*, the prosecutor claimed to strike a black juror,

in part, because he "looked very nervous." *Id.* at 478. But "the record d[id] not show that the trial judge actually made a determination concerning [the juror's] demeanor." *Id.* at 479. "Rather than making a specific finding on the record," "the trial judge simply allowed the challenge without explanation." *Id.* This Court held that it could not "presume that the trial judge credited the prosecutor's assertion" because the judge "may not have recalled" the juror's demeanor, or he may not have had "any impression one way or the other." *Id.* The Fifth Circuit's revisionist view of the record suffers the same defects as the one that *Snyder* rejected. *See also Murray*, 745 F.3d at 1004-05 ("We think it obvious that it would be contrary to clearly established Federal law * * * for a trial judge to 'rubberstamp' a prosecutor's proffered race-neutral explanation for exercising a disputed peremptory strike.").

The state trial court truncated its *Batson* inquiry after Step 2 and the Mississippi Supreme Court endorsed it. For this and the other reasons discussed, federal relief under § 2254(d)(1) is available here, where the state court's adjudication "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

III. THIS COURT SHOULD REVERSE AND REMAND FOR ENTRY OF JUDGMENT AND REINSTATEMENT OF THE WRIT.

Regardless of whether the Court's decision rests on subsection (d)(1) or (d)(2), relief is required. The Court should reverse the Fifth Circuit's order and remand for the entry of judgment that requires Pitchford to be released or retried. *See* JA11-713 (ordering such relief).

Batson is an "automatic reversal precedent[]." *Rivera*, 556 U.S. at 161. Failures to apply *Batson* correctly " 'defy analysis by harmless-error standards' because they 'affec[t] the framework within which the trial proceeds.' " *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991)). "[I]f a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice." *McCollum*, 505 U.S. at 49-50 (internal quotation mark and alterations omitted). For that reason, courts require the entry of judgment for a habeas petitioner, ordering fresh trials whenever such an error occurs. *See*, *e.g.*, *Miller-El II*, 545 U.S. at 266 ("revers[ing]," and "remand[ing] for entry of judgment for petitioner together with orders of appropriate relief"); *cf. Snyder*, 552 U.S. at 484 ("revers[ing]," and "remand[ing] the case for further proceedings not inconsistent with [the Court's holding that *Batson* was violated]").

Such relief is required here. The Mississippi Supreme Court's resolution of Pitchford's *Batson* claim is not merely wrong; it unreasonably applied this Court's *Batson* precedent and unreasonably determined the facts before it. This Court should therefore follow the course charted in *Miller-El II*: reinstate the grant of habeas relief, vacate the challenged conviction, and order Petitioner released if not retried within a reasonable time. *See* 545 U.S. at 240, 266. Indeed—in light of Pitchford's youth at the time of conviction, the fact that he was convicted on a felony-murder theory, and the state's power to retry him following a reversal on these grounds—the *Miller-El II* remedy is the *only* just and equitable result. Whatever

"equitable and prudential considerations" the government asserts cannot outweigh the judicial obligation to "eliminate the taint of racial discrimination" in the jury selection process." *Danforth* v. *Minnesota*, 552 U.S. 264, 278 (2008) (first quote); *Powers* v. *Ohio*, 499 U.S. 400, 402 (1991) (second quote).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand for the entry of judgment in Pitchford's favor.

Respectfully submitted,

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