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 THE MISSISSIPPI LEGISLATIVE BLACK CAUCUS AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

CONSTITUTION

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[*]

The Mississippi Legislative Black Caucus ("MLBC") was initially conceived in 1976, after the election of the first Black Mississippian to the State Legislature in the twentieth century. It was formally established four years later, after the addition of nineteen Black legislators. The MLBC would not exist but for legislation like the Voting Rights Act of 1965 that took aim at racial bias, as well as entities like the Mississippi Freedom Democratic Party and the National Association for the Advancement of Colored People that spoke the law's words into action.

The MLBC thus remains deeply committed to issues that affect all Mississippians, especially those of color, those in rural communities, and those who are disadvantaged. The MLBC's efforts to promote equitability, inclusion, and progress throughout the state are focused on maintaining and expanding our constituents' abilities to participate in the political process—chiefly, the twinned rights to the franchise and to jury service.

INTRODUCTION AND SUMMARY OF ARGUMENT

Eradicating racial bias in jury selection is critical to ensuring public confidence in the fairness of our criminal justice system. Accordingly, this Court in *Swain v. Alabama* reiterated the principle—"consistently and repeatedly applied in many cases coming before this Court"—that "[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted

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[*] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

under it but is at war with our basic concepts of a democratic society and a representative government."[1] The perniciousness of racial bias expressed through racially motivated peremptory challenges is not a historical artifact. Racial bias continues to taint juror selection today. That is particularly true in the Deep South, and, as this Court is well aware, nowhere more so than in Mississippi. Indeed, as historian Christopher Waldrep has observed, "white Southerners guarded their juries more strictly than their voting booths."[2]

Implementing this Court's commands articulated in *Swain*, therefore, would require a significant and prolonged commitment to instituting a rule of law to which much of the region was fundamentally opposed. And state courts in the South—both trial and appellate—would be at the forefront of this effort. Yet between 1966 and 1986, the Mississippi Supreme Court denied all fifteen *Swain* claims before it.[3] In a 1983 dissent from this

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[1] *Swain v. Alabama*, 380 U.S. 202, 204 (1965) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)), *overruled by*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

[2] Christopher Waldrep, Jury Discrimination: The Supreme Court, Public Opinion, and a Grassroots Fight for Equality in Mississippi 4 (2010).

[3] *See McLaurin v. City of Greenville*, 187 So. 2d 854 (Miss. 1966); *Shinall v. State*, 199 So. 2d 251 (Miss. 1967); *Irving v. State*, 228 So. 2d 266 (Miss. 1969); *Watts v. State*, 317 So. 2d 715 (Miss. 1975); *Coleman v. State*, 378 So. 2d 640 (Miss. 1979); *Gaines v. State*, 404 So. 2d 557 (Miss. 1981); *Hughes v. State*, 420 So. 2d 1060 (Miss. 1982); *Gilliard v. State*, 428 So. 2d 576 (Miss. 1983); *Mason v. State*, 440 So. 2d 318 (Miss. 1983); *Booker v. State*, 449 So. 2d 209 (Miss. 1984); *In re Hill*, 460 So. 2d 792 (Miss. 1984); *Ward v. State*, 461 So. 2d 724 (Miss. 1984); *Belino v. State*, 465 So. 2d 1043 (Miss. 1985); *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985); *Caldwell v. State*, 481 So. 2d 850 (Miss. 1985).

Court's denial of certiorari in a Mississippi capital case, Justice Thurgood Marshall commented that the Mississippi Supreme Court's treatment of the issue over time had been so cursory that its reasoning could be quoted "unabridged."[4] The Mississippi Supreme Court, he explained, repeatedly failed to "reexamine[ ] its peremptory challenges."[5] "On the contrary," Justice Marshall wrote, "the [Mississippi Supreme] Court has simply . . . rejected all claims that [the use of] peremptory challenges to exclude members of a particular race from the jury is unconstitutional."[6]

When this Court decided *Batson v. Kentucky* in 1986, Justice Marshall's concurrence reiterated that the challenge of eradicating racial bias from jury selection remained: "[R]acial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole."[7] The discriminatory use of peremptory challenges, he wrote, would be difficult to eliminate.[8] Two decades later, then–Mississippi Supreme Court Justice James Graves, Jr. wrote after viewing the record from Curtis Flowers's third trial, "Unfortunately, as this case has shown, Justice Marshall was correct in predicting that this problem would not subside."[9]

The Mississippi Supreme Court has done little, either prior to Justice Graves's assessment or after, to meet the

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[4] *Gilliard v. Mississippi*, 464 U.S. 867, 871 (1983) (Marshall, J., dissenting).

[5] *Id.* at 873.

[6] *Id.*

[7] *Batson*, 476 U.S. at 106–07 (Marshall, J., concurring) (quoting *Rose v. Mitchell*, 443 U.S. 545, 558–59 (1979)).

[8] *See id.*

[9] *Flowers v. State* (*Flowers III*), 947 So. 2d 910, 937 (Miss. 2007).

challenge that this Court set out decades ago. Instead, in case after case, the Mississippi Supreme Court has failed to confront the corrosive challenges posed by racial bias in jury selection. The result is that prospective jurors in Mississippi have yet to enjoy the full benefits of the remedy that this Court devised in *Batson* and subsequently sharpened in cases like *Flowers v. Mississippi*. This is a case in point.

ARGUMENT

I. The Mississippi Supreme Court Has Failed to Fully Implement *Batson*.

In *Batson,* this Court recognized that *Swain* created a "crippling" burden for defendants challenging racial discrimination in jury selection.[10] And *Batson* evidenced this Court's awareness of the need to craft a more effective mechanism to prevent the exercise of peremptory challenges based on race—a harm that injures not just "the defendant and the excluded juror" but also the "entire community," as well as "undermine[s] public confidence in the fairness of our system of justice."[11] To that end, *Batson* fashioned a three-part test for courts to assess a prosecutor's proffered race-neutral rationale for striking individual jurors. But the test would be effective, as *Batson* noted, only if prosecutors acted legitimately and trial judges were vigilant in identifying prima facie instances of purposeful discrimination.[12] In Mississippi, however, state courts' indifferent policing of racial bias has rendered *Batson* all but unenforceable.

In the year following *Batson*, the Mississippi Supreme

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[10] *See Batson*, 476 U.S. at 92.

[11] *Id.* at 87.

[12] *See id.* at 99 n.22.

Court accepted its first *Batson* case, *Lockett v. State*.[13] The case's stakes could not have been more stark: a capital case where a Black defendant had been convicted by an all-white jury after the prosecutor used peremptory challenges to remove every single Black prospective juror.[14] The Mississippi Supreme Court found no *Batson* violation and affirmed Lockett's conviction and death sentence.[15] To do so, the court considered each exercised strike in a vacuum.[16] As the dissenting opinion pointed out, that approach failed to recognize the prosecutor's likely underlying motive—an all-white jury—and the technique employed to achieve it: a series of peremptory challenges so blatantly consistent that their discriminatory intent was provable by basic math.[17] "The probability of the prosecutor using all challenges in this manner by chance, with no discriminatory intent, gives a level of significance of approximately 0.00000000397."[18] Justice James Robertson elaborated, "[T]he chances of the prosecutor having employed *Batson*-legitimate non-discriminatory reasons in striking peremptorily all five (5) black jurors are slim to none."[19]

Since then, the Mississippi Supreme Court's approach to *Batson* claims has remained largely unchanged. In the thirty-four years after *Batson* was decided, the court has only rarely reversed a lower court on the basis of that

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[13] *Lockett v. State*, 517 So. 2d 1346 (Miss. 1987).

[14] *See id.* at 1348.

[15] *See id.* at 1348–53, 1355.

[16] *See id.* at 1358 (Robertson, J., concurring in part and dissenting in part) (stating that "the gut issue—*pattern* exclusion of all black jurors—is never reached" by the majority (emphasis added)).

[17] *See id.* at 1358–59.

[18] *Id.* at 1359.

[19] *Id.*

decision. Many of those cases involved so-called "reverse-*Batson*" claims, where the State challenged defense counsel's striking of white jurors.[20] Of the few reversals that came after defendant-challenged uses of peremptories against Black jurors,[21] several involved the State's concession that the strikes were based solely on the venireman's race;[22] and in others, the trial court's factual findings appeared explicitly to find pretext, yet the strikes were allowed.[23] That leaves only a handful of cases

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[20] *See Eubanks v. State*, 291 So. 3d 309, 325–27 (Miss. 2020) (King, J., dissenting); *see, e.g.*, *Hardison v. State*, 94 So. 3d 1092, 1101 (Miss. 2012); *State v. Rogers*, 847 So. 2d 858, 862 (Miss. 2003); *Webster v. State*, 754 So. 2d 1232, 1236 (Miss. 2000); *Taylor v. State*, 733 So. 2d 251, 258–59 (Miss. 1999).

[21] *See, e.g.*, *Flowers III*, 947 So. 2d at 917–18; *Berry v. State*, 728 So. 2d 568, 571–72 (Miss. 1999); *Conerly v. State*, 544 So. 2d 1370, 1372–73 (Miss. 1989); *Dedeaux v. State*, 528 So. 2d 300, 300–01 (Miss. 1988); *Goggins v. State*, 529 So. 2d 649, 651–52 (Miss. 1988).

[22] *See, e.g.*, *Goggins*, 529 So. 2d at 652 ("In the case at hand the prosecutor candidly admitted that black jurors were excused because the defendant was black."); *Dedeaux*, 528 So. 2d at 300–01 (reversing because the State was given the opportunity to "furnish racially neutral reasons for its use of peremptory challenges to strike all prospective black jurors . . . and the State . . . confessed on remand" that it could not).

[23] In *Berry v. State*, the State used all six of its peremptory challenges against Black venirepersons. The trial court rejected the State's challenge of one juror as pretextual but allowed the challenge of a second juror, despite the State giving the same reasoning for striking the second juror as it gave for the first juror whose strike was determined to be pretextual. *See Berry*, 728 So. 2d at 572–73. In *Conerly v. State*, the State struck a Black juror, alleging her jury questionnaire was improperly filled out and seemed confusing to her. The trial court explicitly found that her jury questionnaire was properly filled out. The State did not suggest another racially neutral reason for the strike, yet the trial court allowed the strike. The Mississippi Supreme Court held that "[i]n light of the prosecutor's failure to articulate a valid race-neutral reason for striking Juror

where the Mississippi Supreme Court reversed based on an independent determination that *Batson* was violated. All but one of those cases were reversed based on a trial court's procedural missteps; that line of cases, however, has since been abandoned in favor of the waiver rule applied in Petitioner's case.[24] The one case—an appeal from Curtis Flowers's third trial—thus stands alone as the only time the Mississippi Supreme Court independently reversed a lower court on a substantive *Batson* claim.[25] Discussing that meager record, current Mississippi Supreme Court Justice Leslie King (whose *Batson* analysis this Court adopted in *Flowers v. Mississippi*[26]) pulled no punches about his view of the state high court's practices: "In the more than thirty years since *Batson* was decided, this Court has simply failed to give *Batson* any teeth whatsoever, all while prosecutors become increasingly savvy in their explanations for strikes that are often wildly disproportionate based on race."[27]

Swain, the trial court's factual determination that she was eligible and the case law recited above, we have no alternative but to reverse this case." *See Conerly*, 544 So. 2d at 1371–73.

[24] *See, e.g.*, *Thorson v. State*, 653 So. 2d 876, 879–80 (Miss. 1994); *Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991); *Baskins v. State*, 528 So. 2d 1120 (Miss. 1988); *Joseph v. State*, 516 So. 2d 505 (Miss. 1987); *Harper v. State*, 510 So. 2d 530, 532 (Miss. 1987); *Williams v. State*, 507 So. 2d 50, 53 (Miss. 1987).

[25] *See Flowers III*, 947 So. 2d 910.

[26] *Flowers v. Mississippi*, 588 U.S. 284, 314–15 (2019) ("Our disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the [juror's] strike in isolation or instead look at the [juror's] strike in the context of all the facts and circumstances.").

[27] *Eubanks*, 291 So. 3d at 327 (King, J., dissenting).

II. The *Batson* Analysis in *Flowers III* Was an Outlier in the Mississippi Supreme Court's Approach.

In *Flowers III*, the Mississippi Supreme Court reversed Flowers's conviction and death sentence because the court found that the prosecutor, Doug Evans (who also prosecuted Petitioner's case), had engaged in "as strong a prima facie case of racial discrimination as [the court had] ever seen in the context of a *Batson* challenge."[28] The court reached that result by—instead of considering the challenged strikes in a vacuum, as the court had done in *Lockett*—adopting an expansive analysis, consistent with this Court's then–relatively recent decision in *Miller-El v. Dretke*.[29]

Beginning with the venire itself, the Mississippi Supreme Court observed that the overall demographic makeup included "[a]t least 120 potential jurors [who] indicated that they were of African-American descent, meaning that at least forty percent of the potential jury pool was African-American. This percentage," the court noted, "closely tracks the racial demographics of Montgomery County, as . . . African–American citizens comprise forty-five percent of the county's population."[30] The court then examined Evans's strikes, all of which were directed at Black prospective jurors. The court concluded that the resulting white-dominated jury—the lone Black juror was seated only after Evans ran out of

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[28] *Flowers III*, 947 So. 2d at 935.

[29] *See id.* at 936; *see also Miller-El v. Dretke*, 545 U.S. 231, 251–52 (2005) ("As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of *all evidence* with a bearing on it." (emphasis added)).

[30] *Flowers III*, 947 So. 2d at 936.

strikes—could not be considered "happenstance."[31]

The court did not accept at face value Evans's facially neutral reasons for his challenges.[32] Examining each individual strike, the court channeled *Batson*'s and *Miller-El*'s instruction to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[33] About one strike, the court wrote:

> As there was no basis in the record for the reason proffered by the State to strike [a Black woman from the jury], we are not willing to accept the State's unsubstantiated "race-neutral" reason, especially after having found other instances of the State's racially motivated actions during the voir dire process. As the United States Supreme Court stated in *Miller-El*, if the reason given by the State "does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[34]

Although the Mississippi Supreme Court believed that "there was sufficient evidence to uphold the individual strikes of [several jurors] under a 'clearly erroneous' or 'against the overwhelming weight of the evidence' standard," the court viewed those strikes as "also

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[31] *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2007)).

[32] *See id.*

[33] *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see Miller-El*, 545 U.S. at 251–52.

[34] *Flowers III*, 947 So. 2d at 928 (quoting *Miller-El*, 545 U.S. at 252).

suspect" because "an undertone of disparate treatment exist[ed] in the State's voir dire of these individuals."[35]

Furthermore, and relevant here, in response to the State's argument that Flowers's counsel had waived their *Batson* challenge, Justice Graves wrote that a *Batson* claim—made pursuant to the Equal Protection Clause—"affects a substantial right" and is therefore reviewable.[36] But a few years later, when the Mississippi Supreme Court was called on to decide the case under this Court's review, the state court's view had shifted. Justice Graves took his colleagues in the majority to task for their abandonment, without reasoned explanation, of the principle that a *Batson* claim is reviewable, pointing out that the majority relied on outdated, pre-*Batson* case law, including a holding that was later abrogated and reversed, as well as misreadings of other opinions.[37]

Petitioner's failure to secure relief in 2010 on his *Batson* claim from the Mississippi Supreme Court resulted directly from the court's incorrect use of precedent that Justice Graves criticized. Indeed, the court ignored entirely the well-established record that animated the *Batson* analysis in *Flowers III*. The *Pitchford* decision makes no mention at all of Evans's egregious *Batson* violations from *Flowers III*—and thus

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[35] *Id.* at 936.

[36] *Id.* at 927 (noting that the plain error rule must be applied where defendant failed to make contemporaneous objection and defendant's substantive or fundamental rights are affected (citing *Williams v. State*, 794 So. 2d 181, 187 (Miss. 2001))). In contrast, in *Pitchford*, the court imposed its *Batson* argument waiver rule in finding that defense counsel failed to rebut the race-neutral proffers and thereby waived appellate argument from the trial record. *See Pitchford v. State*, 45 So. 3d 216, 266–68 (Miss. 2010) (Graves, J., dissenting).

[37] *See Pitchford*, 45 So. 3d at 267 (Graves, J., dissenting).

is contrary to this Court's analysis in *Flowers v. Mississippi*, which, though decided in 2019, found both relevant and persuasive Evans's prior *Batson* violations.[38] "We cannot just look away," Justice Kavanaugh, writing for this Court, said about Evans's illegal conduct and prior *Batson* violations.[39] "The State's actions in the first four [*Flowers*] trials," he continued, "necessarily inform our assessment of the State's intent going into Flowers' sixth trial."[40] In sum, "[w]e cannot ignore that history. We cannot take that history out of the case."[41]

III. Post-*Flowers*, the Mississippi Supreme Court Has Enforced an Impossible Procedural Hurdle.

This Court's decision in *Flowers v. Mississippi* and the developed jurisprudence on which it was based reiterated once again the challenge this Court posed to state courts forty years before. The Mississippi Supreme Court has nonetheless still failed to rise to the challenge and apply the law as written and, as *Flowers* emphasized, as it has been "vigorously enforced and reinforced" by this Court.[42]

As Justice Sotomayor predicted when this Court denied certiorari in the first *Batson* case to reach the Mississippi Supreme Court post-*Flowers*—*Clark v. Mississippi*—"this Court tells the Mississippi Supreme Court that it has called our bluff, and that this Court is unwilling to do what is necessary to defend its own precedent. The result is that *Flowers* will be toothless in

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[38] *See Flowers*, 588 U.S. at 315, 306–07.

[39] *Id.* at 315.

[40] *Id.* at 306–07.

[41] *Id.* at 307.

[42] *Id.* at 301.

the very State where it appears to be still so needed."[43]

Clark's case is another example of exactly that, where the state court has reverted to its prior methods of dispensing with *Batson* challenges despite this Court's emphatic instruction in *Flowers*. Clark was convicted by a jury of eleven white jurors and one Black juror after the prosecutor used seven of his twelve strikes against Black jurors and five against white ones.[44] (Percentage-wise, the State struck 87.5% of Black jurors and 16.7% of white jurors.[45]) Notwithstanding these statistics, the Mississippi Supreme Court concluded that the State's strikes were race-neutral and therefore comported with *Batson*.[46] Clark then sought post-conviction relief.[47] Clark claimed he did not receive the effective assistance of counsel guaranteed to him by the Sixth Amendment due to his counsel's failure to adequately challenge the State's striking of Black jurors at trial.[48] Though the Mississippi Supreme Court attributed Clark's unsuccessful *Batson* claim to defense counsel's performance,[49] in denying Clark post-conviction relief, the court determined Clark's counsel was, in fact, not deficient.[50]

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[43] *Clark v. Mississippi*, 143 S. Ct. 2406, 2407 (2023) (mem.) (Sotomayor, J., dissenting).

[44] *See Clark v. State*, 343 So. 3d 943, 1015 (Miss. 2022) (King, J., dissenting).

[45] *See id.*

[46] *See id.*

[47] *See Clark v. State*, 418 So. 3d 1226 (Miss. 2025).

[48] *See id.* at 1231–32 (describing Clark's claim).

[49] *See id.* at 1236 (King, J., dissenting).

[50] *See id.* at 1231–32 (majority opinion). Though the standard of review for ineffective assistance of counsel—as provided in *Strickland v. Washington*, 466 U.S. 668 (1984)—is a substantial

Justice King (whose *Batson* analysis this Court adopted in *Flowers v. Mississippi*[51]) expressed his view as to the real reason the Mississippi Supreme Court again failed to apply *Batson* properly.[52] His colleagues denied Clark's claim on direct appeal because Clark allegedly "failed to present a comparative juror analysis or sufficient rebuttal evidence to the trial court."[53] But the record was clear at trial that the judge had *precluded* Clark's counsel from making that showing.[54] Clark's counsel had identified comparator jurors, and the trial court asked for more specifics (as the judge himself did not remember the hundreds of jurors).[55] When counsel did not have all the details offhand, the trial court refused to give counsel any time to review notes and respond.[56] Because defense counsel was never given the opportunity to provide the rest of its argument and put forth detailed comparisons before the trial court, the Mississippi Supreme Court "foreclose[d] any remedy" through Clark's post-conviction proceedings.[57] The courts, in other words, created a catch-22: When the "trial courts prevent defense counsel from presenting sufficient

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hurdle, the irony in the Mississippi Supreme Court's decisions is worthy of note.

[51] *Flowers*, 588 U.S. at 314–15 ("Our disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the [juror's] strike in isolation or instead look at the [juror's] strike in the context of all the facts and circumstances.").

[52] *See Clark*, 418 So. 3d 1226 (King, J., dissenting).

[53] *Id.* at 1236.

[54] *See id.* (citing *Clark*, 343 So. 3d at 954–71, 1014 n.11 (King, J., dissenting)).

[55] *See Clark*, 343 So. 3d at 1014 n.11 (King, J., dissenting).

[56] *See id.*

[57] *Clark*, 418 So. 3d at 1236–37 (King, J., dissenting).

rebuttal evidence during a *Batson* hearing," the Mississippi Supreme Court "blames defense counsel (and not the trial court) for failure to present adequate rebuttal evidence" and denies the defendant the opportunity to remedy that deficiency.[58]

This waiver rule the Mississippi Supreme Court has constructed continues to impair fundamental constitutional protections. Mississippi's unwillingness to fully embrace *Batson* is especially problematic because the disparities in Mississippi's juries are remarkably entrenched.

District Attorney Doug Evans's record is particularly egregious. Evans prosecuted thirteen capital trials between 1999 and 2010.[59] Of the 461 potential jurors for these cases, 69.8% were white (322/461), and 30.2% were Black (139/461).[60] Across this venire, Evans and his prosecutors struck 65.2% (90/138) of eligible Black venire members, compared to 8.2% (26/316) of eligible white venire members.[61] This statistically significant disparity reflects a difference of fifty-seven percentage points in the

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[58] *Id.* Given that a state court defendant must make a showing of sufficient prejudice under *Strickland* to prevail on ineffective assistance of trial claims for unsuccessful *Batson* challenges, *Powers v. State*, 371 So. 3d 629, 684 (Miss. 2023), defendants in Mississippi face significant hurdles when establishing *Batson* violations.

[59] The collected data included information on jury selection for four of Curtis Flowers's six trials (*Flowers III-VI*), and for nine other capital trials, including Terry Pitchford's, Petitioner. (The remaining eight are Roderick Eskridge, Barry Love, Bradford Staten, Christopher Rosenthal, Lawrence Branch, Krishun Williams and Derrick Willis, Deondray Johnson, and Billy Joe Barnett.) *See* Affidavit of Barbara O'Brien, Pet'r's Ex. 33, ¶ 3, *Flowers v. State*, 2015-DR-00591-SCT (Miss. Mar. 17, 2016).

[60] *See id.* ¶ 6.

[61] *See id.* ¶ 7.

strike rates (65.2-8.2) and a ratio between strike rates of 7.95 (65.2/8.2).[62] Put differently, there is less than a 1/1,000 chance that a disparity of this magnitude could occur with a race-neutral jury selection process.[63] This extraordinary data is not skewed by outlier cases, as the pattern also holds true within each of the cases.[64] Black venire members were more than eight times more likely to be struck than their white counterparts.[65]

In Petitioner's case, 32.8% (40/122) of the prospective jurors that responded to the summons were Black.[66] After strikes for cause and other excuses were granted in an extraordinarily abbreviated voir dire that took place in a single morning, 37.5% (36/96) of the prospective jurors were Black.[67] Evans then tendered sixteen of the first eighteen white venire members, using four consecutive peremptory challenges to remove four of five Black venire members.[68] Thereafter, Evans accepted nine of the next ten white prospective jurors.[69] Evans's strike rate for Black jurors was 80%; his three strikes across thirty-five

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[62] *See id.*

[63] *See id.*

[64] *See id.* ¶ 8.

[65] *See id.*

[66] First Amended Petition for Writ of Habeas Corpus by a Person in State Custody at 8, *Pitchford v. Cain*, 706 F. Supp. 3d 614 (N.D. Miss. 2023) (No. 4:18-cv-00002-MPM) (citing Transcript at 331, *Pitchford v. Cain*, 706 F. Supp. 3d 614 (No. 4:18-cv-00002-MPM); Record at 349–862, 1107, *Pitchford v. Cain*, 706 F. Supp. 3d 614 (No. 4:18-cv-00002-MPM)).

[67] *Id.* (citing Transcript, *supra* note 66, at 331; Record, *supra* note 66, at 349–862, 1107).

[68] *Id.* at 9 (citing Transcript, *supra* note 66, at 307–22).

[69] *Id.* (citing Transcript, *supra* note 66, at 326–29; Record, *supra* note 66, at 395–401, 471–74, 479–80, 515–18, 631–34, 715–18, 1104–09).

white venire members was 8.5%.[70] The seated jury included only one of the fourteen qualified Black jurors.[71]

Among Evans's strikes, he struck Carlos Ward, a Black male.[72] Among Evans's proffered reasons for striking Ward was that Ward had no position on the death penalty and was, as an unmarried male with a child, too closely related to Petitioner.[73] But several white prospective jurors directly compared to Ward shared at least one, and sometimes more, of the same characteristics as Ward.[74] Evans did not strike those white jurors.[75] Similar disparate circumstances regarding Evans's strikes of Black jurors Linda Ruth Lee and Christopher L. Tillmon have since surfaced as well. To explain the strike of Lee, Evans claimed that she had "mental problems" and was late in returning to court.[76] Evans did not voir dire Lee about the alleged mental health issues (they were alleged as information gleaned from his investigator), and though Lee had been tardy in returning to court, there were several other late-

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[70] *Id.* at 10 (citing Transcript, *supra* note 66, at 321–29).

[71] *Id.* at 8.

[72] *Id.* at 10–11.

[73] *Id.*

[74] *Id.* at 10–11, 11 n.8.

[75] Petitioner deposed Evans as part of discovery afforded to him during the pendency of his habeas petition in district court. In that deposition, when questioned about the bases of the Ward strike, Evans repeated various reasons he proffered at trial, adding that Ward and Petitioner "both live in the same community. They . . . are so much alike that I'm afraid that he would have associated himself with the defendant more than he should have at the trial." *Id.* at 23 (citing Appendix at 5415, *Pitchford v. Cain*, 706 F. Supp. 3d 614 (No. 4:18-cv-00002-MPM)). When asked where Ward lived, however, Evans said he did not know. *Id.* (citing Appendix, *supra*, at 5421).

[76] *Id.* at 12.

returners.[77] Evans did not attempt to remove any of the others.[78] When the trial court rejected Evans's explanation for the juror's lateness as an acceptable reason, Evans asserted her mental illness as a basis instead, though it was unsubstantiated.[79] Finally, Evans struck Tillmon, a Black male.[80] Tillmon responded to his juror questionnaire that he strongly favored the death penalty and worked for law enforcement.[81] Favoring the death penalty and having worked in law enforcement are typically coveted characteristics when the prosecution is selecting a capital jury.[82] Tillmon also answered that he had a brother who had been convicted of manslaughter.[83] Though Evans struck Tillmon, two white jurors who shared the same characteristics, Jeffrey Counts and Henry Bernreuter, were seated.[84] Evans did not voir dire on this issue with any of the three jurors.[85]

If there were any doubt as to the pretextual nature of these strikes, the State's annotated venire lists removed it. Gained in post-conviction discovery, the lists appear to contain contemporaneous notes regarding demographic information about prospective jurors.[86] Every juror's

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[77] *Id.* at 13 (citing Transcript, *supra* note 66, at 215, 238–62, 307–18).

[78] *Id.* (citing Transcript, *supra* note 66, at 307–18).

[79] *Id.* at 14 (citing Transcript, *supra* note 66, at 319).

[80] *Id.* at 14–15.

[81] *Id.* (citing Transcript, *supra* note 66, at 799–802).

[82] *Id.* at 14.

[83] *Id.* at 14–15 (citing Transcript, *supra* note 66, at 325).

[84] *Id.* at 15 (citing Transcript, *supra* note 66, at 326, 328; Record, *supra* note 66, at 399–400, 479–90, 1104).

[85] *Id.*

[86] *Id.* at 19–22.

race and sex were noted.[87] Like the venire lists in *Foster v. Chatman*,[88] the lists here include notations like "NO," "NO WAY," and "NO D.P."[89] At his deposition, Evans claimed, without a corroborating court order or other directive, that the instruction to denote race and gender of prospective jurors on venire lists was from "[t]he judges in the Fifth Circuit Court District."[90] When pressed for specifics, Evans averred that "[t]he courts just said they wanted it. . . . It wasn't in a court hearing or anything . . . like that."[91] This justification, as in *Foster*, should fall flat as it "reeks of afterthought."[92]

In sum, Petitioner's case presents this Court with another opportunity to remedy pervasive constitutional deficiencies "simply [by] enforc[ing] and reinforc[ing] *Batson* by applying it to the extraordinary facts of this case."[93] Indeed, all Petitioner seeks is a straightforward application of *Batson*.

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[87] *Id.* at 18.

[88] *Foster v. Chatman*, 578 U.S. 488, 493–95 (2016) (describing venire lists that the Court would consider when holding the State invalidly exercised peremptory challenges on the basis of race).

[89] "D.P." appears to stand for "death penalty." First Amended Petition for Writ of Habeas Corpus by a Person in State Custody, *supra* note 66, at 19–22.

[90] *Id.* at 22 (citing Appendix, *supra* note 75, at 5353–54).

[91] *Id.* (citing Appendix, *supra* note 75, at 5354).

[92] *Foster*, 578 U.S. at 514 (quoting *Miller-El*, 545 U.S. at 246).

[93] *See Flowers*, 588 U.S. at 316.

CONCLUSION

State courts in Mississippi have a long, troubling history of circumventing the constitutional protections that this Court set forth in *Batson*. In *Flowers*, this Court rightly reiterated and reinvigorated those fundamental constitutional rights. But post-*Flowers*, Mississippi has again found another way to avoid meaningful enforcement of *Batson* by creating insurmountable hurdles for defendants who assert that peremptory challenges were exercised in a racially discriminatory manner. This Court should, again, reverse a Mississippi Supreme Court decision that flouts this Court's unambiguous precedent and permits racial bias in jury selection to persist.

Respectfully submitted,

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