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 OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, AND FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has litigated cases to advance due process and fundamental fairness for defendants in criminal cases and, in particular, has filed briefs concerning racial bias in jury selection. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (amicus brief); *Johnson v. California*, 545 U.S. 162 (2005) (amicus brief). The ACLU's Capital Punishment Project defends persons facing the death penalty and their constitutional rights and has expertise on the issues and practical problems surrounding capital litigation and capital jury selection. The ACLU of Mississippi, founded in 1969, is the statewide affiliate of the ACLU and is committed to the same mission.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is based at the University of California, Irvine School of Law and advances justice through research, advocacy, and education. The Korematsu Center works to promote racial and social justice and has played a key role in defending *Batson* and advancing reforms to peremptory challenges. The Korematsu Center does not, in this brief or otherwise, represent the official

[1] No party or counsel for any party authored this brief in whole or in part, and no person other than *amici* and undersigned counsel made a monetary contribution intended to fund the preparation or submission of this brief.

views of the University of California, Irvine School of Law.

INTRODUCTION AND SUMMARY OF ARGUMENT

During jury selection for Petitioner Terry Pitchford's capital trial, the prosecutor noted the race of prospective jurors by marking them "W" or "B," then exercised four of his twelve peremptory challenges to strike Black prospective jurors. As a result, Mr. Pitchford was tried before a jury consisting of one Black juror among fourteen jurors and alternates (approximately 7% Black)—a stark contrast to the original 96-member venire, which consisted of 60 White individuals and 36 Black individuals (37.5% Black), on par with the county's demographics.[2] These are "remarkable" statistics suggesting race discrimination in the jury selection process. *See Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 240 (2005).

Mr. Pitchford's counsel repeatedly and timely challenged the prosecutor's peremptory strikes against Black venire members under *Batson v. Kentucky*, which forbids racial discrimination in jury selection and requires a three-step process for challenging a peremptory strike: (1) The moving party must establish a prima facie case of race discrimination; (2) the responding party may rebut that showing with a race-neutral reason; and (3) the court then must consider all relevant facts and circumstances to "determine if the defendant has

[2] Thirty-one of the Black venire members were excused for cause. Pet. Br. at 22.

established purposeful discrimination." 476 U.S. 79, 96-98 (1986). The trial court skipped the third step entirely, ending the *Batson* inquiry after finding that the prosecutor's proffered reasons were facially race neutral. When defense counsel attempted to renew her *Batson* objection, the trial court cut her off, stating that her objection was "clear in the record." JA178.

The trial court thus did not consider the ample evidence demonstrating that the prosecutor's supposedly race-neutral justifications for striking each of the four Black prospective jurors were pretextual. All of that evidence was of a type endorsed by this Court as appropriate proof of pretext at *Batson*'s third step. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (endorsing comparative juror analysis); *Flowers v. Mississippi*, 588 U.S. 284, 307 (2019) (evaluating the prosecutor's pattern of disproportionately striking Black prospective jurors).

On direct appeal, the Mississippi Supreme Court committed multiple major errors. First, contrary to this Court's decisions in, *inter alia*, *Batson*, *Miller-El II*, *Snyder*, and *Flowers*, the Mississippi Supreme Court held that, even if relevant facts and circumstances exist elsewhere in the trial record, "[i]f the defendant fails to rebut" a prosecutor's race-neutral reason with particular facts and circumstances, "the trial judge *must* base his [or her] decision on the reasons given by the State." *Pitchford v. State*, 45 So. 3d 216, 227 (Miss. 2010) (emphasis added) (citation omitted). Simply put, the Mississippi Supreme Court deemed the relevant facts and circumstances that a trial court must consider at *Batson*'s third step to *exclude* any facts and

circumstances not expressly "argu[ed] . . . by [defense] counsel" "during the *Batson* hearing." *Id.* at 228 & n.17. That contravened this Court's clear instruction that in evaluating discriminatory intent at step three, "[t]he trial court must consider the prosecutor's race-neutral explanations in light of *all* of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 588 U.S. at 302 (emphasis added).

Second, and perversely compounding that initial error, the Mississippi Supreme Court itself refused to consider other facts in the trial record for the first time on appeal, holding that Mr. Pitchford had waived his right to argue on appeal that those facts and circumstances demonstrated that the prosecutor's reasons for striking the four Black jurors were pretextual. *Pitchford v. State*, 45 So. 3d at 227. The Mississippi Supreme Court so held even though the trial court refused to conduct any step-three inquiry and told defense counsel that the court would not hear anything further on the subject but would simply note her objection for the record.

On habeas review, the Fifth Circuit wholly endorsed the Mississippi Supreme Court's conclusions. *See Pitchford v. Cain*, 126 F.4th 422, 428-30 (5th Cir. 2025).

Amici write to explain why the Mississippi Supreme Court's and Fifth Circuit's errors, if left standing, would severely curtail defendants' and courts' ability to root out prosecutors' use of pretextual justifications to support racially motivated peremptory strikes. This result would improperly

permit courts to blind themselves to significant evidence supporting a finding of discrimination. And it would lead to pernicious outcomes—particularly in capital cases—contrary to this Court's line of precedents from *Batson* through *Miller-El II*, *Snyder*, and *Flowers*.

I. Although state court decisions on constitutional claims are entitled to deference under 28 U.S.C. § 2254(d), a state court may not ignore or rewrite this Court's constitutional holdings. By limiting the step-three analysis only to arguments raised by the defense, endorsing the trial court's failure to conduct any step-three inquiry at all, and then holding that the defense waived any step-three arguments, the Mississippi Supreme Court unduly constrained the third step of *Batson*, impeding courts' ability to identify and root out pretext. That ruling embraced a manifestly unreasonable application of clearly established federal law.

Pretext is a persistent and severe threat to the proper working of the *Batson* scheme. Pretext has also proven difficult to unearth and uproot. This Court's clear and settled requirement that courts consider a prosecutor's race-neutral justification in light of all relevant facts and circumstances is particularly important in providing courts with a mix of tools to identify and eliminate pretextual discrimination. This Court recently employed many of those tools in another Mississippi case involving the same prosecutor and the same trial court. *See Flowers*, 588 U.S. 284.

The Mississippi Supreme Court's and Fifth Circuit's decisions, if upheld, threaten to artificially and significantly shrink the universe of facts and circumstances courts may consider to determine whether a prosecutor's justification for a strike is pretextual. That result cannot be squared with this Court's *Batson* jurisprudence.

II. Faithful application of *Batson* is especially important in death penalty cases, as the risk of departures from this Court's *Batson* jurisprudence in the capital context carries especially dire consequences. Racial disparities have been shown to persist in the exercise of peremptory strikes, particularly in death penalty cases. This is especially troubling given the critical importance of racial diversity in capital juries. Moreover, the death qualification process often results in fewer Black prospective jurors in the venire at the peremptory challenge stage, amplifying the impact of an impermissibly race-motivated peremptory strike. It also may arm prosecutors with a facially race-neutral justification to deploy as pretext for a racially discriminatory strike, as happened in Mr. Pitchford's case.

The Court should reverse and remand for the entry of judgment in Petitioner's favor.

ARGUMENT

I. THE MISSISSIPPI SUPREME COURT DECISION OPENS THE DOOR TO PRETEXTUAL DISCRIMINATION, CONTRARY TO THIS COURT'S *BATSON* JURISPRUDENCE.

A. This Court Has Repeatedly Rejected State Courts' Attempts to Rewrite or Curtail Federal Constitutional Protections, and Should Do So Again Here.

When this Court speaks on a constitutional question, its words are authoritative. The habeas context is no exception to that rule. The deference afforded to state court adjudications of constitutional claims under 28 U.S.C. § 2254(d) does not, by the statute's plain text, grant state courts a license to ignore this Court's holdings and depart from this Court's constitutional frameworks. Under this Court's habeas jurisprudence, a state court decision that substitutes its own rule for one this Court has supplied, or otherwise offers less protection than required under this Court's decisions, is "contrary to" or "an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1). That is precisely what the Mississippi Supreme Court did here when it imposed restrictions on *Batson*'s third step, excluding consideration of any evidence or arguments not specifically raised by the defense (even while the trial court declined to continue its inquiry after the prosecution proffered its supposedly race-neutral reasons) and thus curtailing courts' review of "*all* of

the relevant facts and circumstances" bearing on whether a peremptory strike was racially motivated. *Flowers*, 588 U.S. at 302 (emphasis added). Habeas relief is accordingly appropriate.[3]

This Court has routinely rejected on habeas review state court rulings that have constrained or foreclosed a constitutionally required inquiry into all relevant facts and circumstances. For example, in *Williams v. Taylor*, 529 U.S. 362 (2000), a capital case involving a claim of ineffective assistance of counsel, this Court held that the Virginia Supreme Court's prejudice determination was "unreasonable" because it imported and applied an inapposite test that prevented the court from "evaluat[ing] the totality of the available mitigation evidence" as required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 529 U.S. at 397-98; *see also Sears v. Upton*, 561 U.S. 945, 954-55 (2010) (rejecting state court's "little or no mitigation evidence" test and reiterating that "the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below"). Similarly, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court held that the state court flouted the "basic requirements" set forth in *Ford v. Wainwright*, 477 U.S. 399 (1986), for determining a prisoner's competence for execution. *Panetti*, 551 U.S. at 950-51. *Ford* made clear that those basic requirements include a "fair hearing," accompanied by an opportunity to submit evidence—including

[3] As Petitioner identifies, habeas relief is also appropriate under 28 U.S.C. § 2254(d)(2) because the Mississippi Supreme Court's waiver finding was an "unreasonable determination of the facts." *See* Pet. Br. at 30-40.

independent psychiatric evidence—and argument from counsel. *Id.* at 949-50 (citation omitted). Because the state court failed to provide "a constitutionally adequate opportunity to be heard" and foreclosed consideration of relevant psychiatric evidence, this Court held that the state court's "determination cannot be reconciled with any reasonable application of the controlling standard in *Ford*." *Id.* at 952-53.

These cases and others illustrate the basic principle that state courts may not rewrite or ignore this Court's constitutional jurisprudence. *See also, e.g.*, *Smith v. Arizona*, 602 U.S. 779, 794 (2024) (state evidentiary rules not controlling on whether federal confrontation violation has occurred); *Moore v. Texas*, 581 U.S. 1, 5-6 (2017) (state court could not adopt its own so-called *Briseño* factors to determine whether defendant was intellectually disabled and thus ineligible for death penalty); *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (state court unreasonably analyzed claim of ineffective assistance in plea bargaining by asking whether decision to reject plea offers was voluntary rather than applying *Strickland* ineffective assistance test). Where this Court has prescribed a particular constitutional inquiry, state courts must scrupulously apply each step of that inquiry.

Here, the Mississippi Supreme Court's erroneous waiver ruling effectively papered over the trial court's failure to weigh the prosecutor's proffered race-neutral reasons in light of all relevant facts and circumstances. Both of these errors, separately and together, overrode the third step of the constitutionally required *Batson* analysis and

contravened this Court's precedents. As described below, that result cannot be squared with this Court's jurisprudence, and it distorts *Batson* beyond recognition.

B. Limiting a Court's Third-Step Inquiry into All Relevant Facts and Circumstances Eviscerates *Batson*'s Safeguards Against Pretextual Peremptory Strikes.

In *Batson v. Kentucky*, this Court adopted a three-step procedure for courts to root out racial discrimination in the exercise of peremptory strikes. Once a defendant has established a prima facie case of discrimination, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98. At the third step, the trial court incurs a "duty" to conduct a searching review "to determine if the defendant has established purposeful discrimination." *Id.*

Critically, *Batson*'s third step requires courts to ascertain whether a prosecutor's race-neutral justification is genuine or is instead mere pretext for a racially discriminatory intent. Pretext—a "false or weak" race-neutral reason "advanced to hide the actual or strong reason or motive," *Pretext*, Black's Law Dictionary (12th ed. 2024)—has long been viewed as a fundamental threat to the effective operation of this Court's rule under *Batson* and its progeny. Indeed, as far back as the decision in *Batson* itself, Justice Marshall warned that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror," potentially circumventing *Batson*'s core

protections. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); *see also Purkett v. Elem*, 514 U.S. 765, 773 (1995) (Stevens, J., dissenting) (noting that "rote neutral explanations" that "bear facial legitimacy but conceal a discriminatory motive" threaten to turn *Batson* into a "charade" (internal quotation omitted)).

Forty years of *Batson* and related state-court jurisprudence have demonstrated the "disturbing ease with which a prosecutor can defeat a prima facie discrimination case" by offering purportedly race-neutral reasons. Jonathan B. Mintz, Batson v. Kentucky*: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 Cornell L. Rev. 1026, 1037 (1987). In fact, to this day, some prosecutors are "explicitly trained to provide 'race-neutral' reasons for strikes against people of color" to evade detection when faced with a defendant's *Batson* challenge. Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* 43 (2021), https://perma.cc/3FNJ-V2PG [hereinafter EJI Report]. For instance, a 2020 study reported how district attorney's offices in California trained prosecutors to walk into court armed with stock, race-neutral reasons previously found acceptable by courts. *See* Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* 49-50 (2020), https://perma.cc/L6RR-RM9P. One such set of training materials, *The Inquisitive Prosecutor's Guide* from Santa Clara County, lists 77 race-neutral reasons for striking a prospective juror, including: too much education, or too little; a lack of community or

family ties, or too many; previous service on a hung jury, or a lack of previous service on any jury at all. *See id.* at 50. Similar examples have been reported in other states, including Pennsylvania, North Carolina, and Texas. *See* EJI Report at 43 (North Carolina and Texas examples); *Commonwealth v. Basemore*, 744 A.2d 717, 729 (Pa. 2000) (describing training video in which prosecutor offered "techniques" for "accomplishing" discriminatory strikes, including "the invention of pretextual reasons for exercising peremptory challenges").

Recognizing the corrosive effects of such tactics on the integrity of a justice system constitutionally required to be free from invidious racial discrimination, this Court has often emphasized that a prosecutor's use of pretext as cover for a discriminatory strike violates the Equal Protection Clause. *See, e.g.*, *Snyder*, 552 U.S. at 485 (explaining that the "prosecution's proffer" of a "pretextual explanation naturally gives rise to an inference of discriminatory intent"); *Miller-El II*, 545 U.S. at 252.[4] And the responsibility to root out pretext ultimately falls upon the trial court at *Batson* step three, at which "[t]he trial judge *must* determine whether the

[4] As this Court has made clear, the interests protected by *Batson* and its progeny extend beyond the rights of the individual defendant. *See, e.g.*, *Flowers*, 588 U.S. at 301 ("*Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."); *Powers v. Ohio*, 499 U.S. 400, 406 (1991) ("*Batson* was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors. *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large." (cleaned up)).

prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 588 U.S. at 303 (emphasis added).

Trial courts' duty to identify and reject pretextual explanations at *Batson* step three is particularly important because, as this Court has explained, the parties' respective burdens at steps one and two are not especially demanding. *See, e.g.*, *Johnson v. California*, 545 U.S. 162, 168-70 (2005) (rejecting a "more likely than not" threshold and holding that, at *Batson* step one, a defendant need only provide "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred"); *Purkett*, 514 U.S. at 768 (holding that, at *Batson* step two, even a "silly or superstitious" explanation will suffice to move on to step three, so long as the explanation is race-neutral). Accordingly, in trial courts today, it is often the third step at which the heart of *Batson* protection lies.

Precisely because of the threat posed by pretext and the difficulties encountered in detecting it, this Court has repeatedly made clear that, at *Batson*'s third step, courts "must consider the prosecutor's race-neutral explanations in light of *all of the relevant facts and circumstances*." *Flowers*, 588 U.S. at 302 (emphasis added); *see also Miller-El II*, 545 U.S. at 251-52 (*Batson* step three "requires the judge to assess the plausibility of" the race-neutral "reason in light of all evidence with a bearing on it"); *Snyder*, 552 U.S. at 478 ("In *Miller-El v. Dretke,* the Court made it clear that in considering a *Batson* objection, or in

reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted."); *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (reiterating that this Court has "made it clear" that, "in reviewing a ruling claimed to be a *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted" by the trial court (cleaned up)). And, mindful that the work of unearthing and uprooting pretext is a "difficult burden" to impose on trial courts, *see Batson*, 476 U.S. at 105 (Marshall, J., concurring), this Court has approved trial courts' use of numerous tools, available based on the trial court record alone, to assist in carrying out this critical task. These tools include:

- Comparative juror analyses, showing that the "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve." *Flowers*, 588 U.S. at 311 (citation omitted); *see also Foster*, 578 U.S. at 505-06, 512-13; *Snyder*, 552 U.S. at 483-84; *Miller-El II*, 545 U.S. at 241;

- Disparities in the *number* of questions asked by the prosecutor to Black versus non-Black members of the jury pool. *See Flowers*, 588 U.S. at 310 (asking "a lot of questions" of Black prospective jurors enables a prosecutor to "try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike");

- Disparities in the *wording* of questions asked by the prosecutor to Black versus non-Black members of the jury pool. *See Miller-El II*, 545 U.S. at 255 (describing the selective asking of "graphic" *voir dire* questions "to prompt some expression of hesitation" on the death penalty "and thus to elicit plausibly neutral grounds" for a racially discriminatory strike);

- Misstatements by the prosecutor of the *voir dire* record to support a race-neutral reason. *See Flowers*, 588 U.S. at 314 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent."); *see also Miller-El II*, 545 U.S. at 244 (finding relevant to finding of pretext that the prosecutor "simply mischaracterized" stricken juror's "testimony" on *voir dire*);

- Evidence that the prosecutor conducted special investigations into qualified Black prospective jurors to identify some race-neutral basis to disqualify them. *See Flowers*, 588 U.S. at 302, 309-10 (identifying as relevant "disparate . . . investigation of black and white prospective jurors in the case");

- Evidence that the prosecutor selectively employed other tactics to avoid seating Black prospective jurors—e.g., a selective "jury shuffle" used to move Black prospective jurors to the back of the jury pool. *See Miller-El II*, 545 U.S. at 253; and

- Evidence of the prosecutor's own "demeanor" or "credibility" in asking questions, making statements during *voir dire*, or responding to the *Batson* challenge. *See Flowers*, 588 U.S. at 302-03.

This list is not exhaustive, but it illustrates numerous ways in which a court's consideration of a "prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances" powerfully checks the use of pretext as a cover for discrimination. *Flowers*, 588 U.S. at 302. In short, by mandating examination of all relevant facts and circumstances in considering whether a race-neutral reason is in fact pretextual, this Court has endowed trial courts (and reviewing courts) with the necessary means to gauge the genuineness of a prosecutor's justifications.

Given all this—the plain threat that pretext poses to faithful application of *Batson*'s dictates; the myriad examples of efforts to thwart *Batson*; and this Court's repeated command that trial courts use all relevant facts and circumstances to root out pretext at *Batson* step three—affirming the Fifth Circuit and Mississippi Supreme Court decisions in this case would cause a fundamental "backsliding" in how *Batson* protections should be "vigorously enforced and reinforced." *Id.* at 301.

Among other problems, *see* Pet. Br. at 30-50, the decisions of the Mississippi Supreme Court and the Fifth Circuit have the practical effect of artificially and dramatically shrinking the universe of "facts and circumstances" available to the trial court to determine whether a prosecutor's reason at step two

was pretextual. Specifically, the Mississippi Supreme Court's decision holds that, even if facts and circumstances constituting proof of pretext are available to the trial court elsewhere in the trial record, "[i]f the defendant fails to rebut"—i.e., fails to expressly offer those facts and circumstances in rebuttal *after* the prosecutor gives a race-neutral reason—"the trial judge *must* base his [or her] decision on the reasons given by the State." *Pitchford v. State*, 45 So. 3d at 227 (emphasis added) (citation omitted). Thus, the Mississippi Supreme Court's ruling would *prohibit* a trial court from making a finding of pretext based upon any evidence, facts, or circumstances not expressly cited by defense counsel at *Batson*'s third step. *See id.* at 228 & n.17 (confirming that, "in adjudicating the pretext issue[,] the trial judge must look at the totality of the circumstances and all of the facts" but holding that "those circumstances and facts do not include arguments not made by [defense] counsel" "during the *Batson* hearing"). Similarly, the Fifth Circuit decision holds that the trial court, in assessing whether the prosecutor's step-two reason was pretextual, was entitled to "refus[e] to consider" facts elsewhere in the trial record, when these facts were not "argued" by defense counsel "during *voir dire* or post-trial." *Pitchford v. Cain*, 126 F.4th at 430.

Worse still, the decisions of the Mississippi Supreme Court and the Fifth Circuit, if upheld, would correspondingly—and equally artificially—shrink the record on appeal for any challenge regarding pretext to just those facts that were squarely presented by defense counsel at a particular juncture in the *Batson* colloquy, effectively insulating from review the trial

court's failure or refusal to consider other facts in the trial record. *See Pitchford v. State*, 45 So. 3d at 227-28 (refusing to "entertain" arguments concerning pretext based on facts in the record but deemed not to have been raised "during the *Batson* hearing"); *Pitchford v. Cain*, 126 F.4th at 428-29 (asserting that "a defendant's failure to challenge a prosecutor's race-neutral explanation constitutes waiver").

The upshot of these decisions, then, is that by invoking the language of waiver and limiting the trial court's inquiry at step three to evidence and arguments specifically raised by the defense, the Mississippi Supreme Court and the Fifth Circuit have effectively limited the *Batson* step-three universe—and the "record" on appeal—to *only* those facts and circumstances that defense counsel can get out on the record in the narrow window of time between (a) the prosecutor's proffer of race-neutral reasons at step two;[5] and (b) whenever the trial court makes a determination, if even stated explicitly at all, that the prosecutor's justifications were not a pretext for discrimination. As Petitioner persuasively argues, this is an unrealistic and unreasonable limitation in view of the sheer volume of record material developed through the jury selection process. *See* Pet. Br. at 45-46 ("Jury selection in this case involved a 126-member

[5] It is, of course, impossible for a defendant to identify, let alone present, facts showing that the prosecutor's race-neutral reason at step two is pretext *before* the race-neutral reason has actually been given. The best defense counsel can do before the prosecutor offers a race-neutral reason, then, is to remind the trial court to faithfully carry out its duty to evaluate the forthcoming justification in light of all relevant facts and circumstances, as defense counsel did here. *See* JA169.

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.").[6] Constraining courts to consider only the evidence and arguments that defense counsel is able to muster in the midst of the "hurried" nature of the "back and forth of a *Batson* hearing," *Flowers*, 588 U.S. at 314, is plainly an unreasonable departure from *Batson*'s dictates.

This artificial limitation on what a court can consider at step three simply cannot be reconciled with this Court's unbroken line of cases requiring courts to consider *all* of the relevant facts and circumstances that bear on pretext, *see supra* at 13-14, and not just *some* of them. Nor is it any answer to reframe the opinions as permitting reviewing courts to consider all the facts and circumstances in the trial record so long as defense counsel formally *argues* that a comparative analysis (or any other inquiry that might reveal pretext, *see supra* at 14-16) needs to be undertaken. This Court in *Miller-El II* flatly rejected the dissent's "conflat[ion of] the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings," on the one hand, and "theories about that evidence," on the other, stating that "[t]here can be no question that the transcript of *voir dire*, recording the evidence on which Miller-El bases his arguments and on which we base our result. . . was

[6] And in this case, the trial court did not even entertain third-step arguments at all.

before the state courts."[7] 545 U.S. at 241 n.2; *cf. Foster*, 578 U.S. at 501 (refusing to "blind" itself to all relevant evidence bearing on discriminatory purpose).

The decisions of the Mississippi Supreme Court and the Fifth Circuit also cannot be squared with this Court's recognition that the clearest evidence of pretext may arise outside the trial record:

> Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

Miller-El II, 545 U.S. at 240 (citation omitted); *see also Foster*, 578 U.S. at 508 (considering evidence from post-trial proceedings in evaluating pretext).

Clear evidence of pretext may be found, for example, in admissions of motivations based on race; marked up venire lists divided by race (like those District Attorney Evans used here, Pet. Br. at 7-8); other evidence "supplie[d]" by history, such as discriminatory policies and *voir dire* training materials, *Miller-El II*, 545 U.S. at 263-64, 266; and evidence of a clear "pattern" of racially motivated peremptory strikes continuing across multiple trials,

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[7] So too here. The facts and circumstances on which Petitioner relies were all part of the existing trial court record. *See* Pet. Br. at 22-29.

Flowers, 588 U.S. at 304. Thus, by unreasonably finding waiver, the Mississippi Supreme Court prevented the trial and reviewing courts from considering not just relevant evidence in the trial record, but also such probative evidence outside the trial record.

"[E]ven a single instance of race discrimination against a prospective juror is impermissible." *Id.* at 300. This Court should not accept an outcome in which some *Batson* violations, provable by evidence showing that the prosecutor's purported race-neutral reason is pretext for race discrimination, will go unremedied because a trial court refuses to consider such evidence, and reviewing courts likewise treat such evidence as not part of the relevant record of review. Limiting the analysis in this way serves only to protect and entrench pretextual race discrimination, not uproot it.

II. THE REALITIES OF CAPITAL LITIGATION NECESSITATE COURTS' FAITHFUL APPLICATION OF THE *BATSON* DOCTRINE IN DEATH PENALTY CASES.

Nowhere is the need for faithful adherence to this Court's clearly established *Batson* jurisprudence more apparent than in the capital context.

As studies demonstrate, notwithstanding this Court's clear dictates, prosecutors continue to exercise peremptory challenges in a racially discriminatory manner, especially in death penalty cases. The damaging consequences of discriminatory strikes are particularly acute in death penalty cases, considering the incalculable stakes and the countless studies

showing that diverse juries are best positioned to engage in fair deliberation regarding both guilt and sentencing. Moreover, the practical effect of death qualification is that diverse juries are more difficult to obtain in capital cases. These realities underscore the need for courts to apply *Batson* in capital cases in the proper manner dictated by this Court, including by undertaking a review of all facts and circumstances bearing on discrimination at step three.

A. Racial Disparities in the Use of Peremptory Strikes Persist, Particularly in the Capital Context.

Despite this Court's repeated admonitions, racial disparities in jury selection remain a persistent problem, especially in the capital context. For example, an examination of capital cases in South Carolina during the period 1997–2014 revealed that prosecutors exercised peremptory challenges on prospective Black male jurors over three times more often than on prospective White male jurors, and on prospective Black female jurors 1.67 times more often than on prospective White female jurors. *See* Ann M. Eisenberg et al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. Rev. 373, 384 (2017). This study noted that, "[a]lthough race- or gender-neutral factors might explain some of these disparities, the consistency of these findings with those of previous studies suggests that prosecutors' use of peremptory strikes was motivated by race . . . ." *Id.* at 389.

Similarly, an examination of post-*Batson* capital cases in North Carolina revealed that during a twenty-year period through July 1, 2010, in 173 capital trials, "prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black." Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1533 (2012). Importantly, these disparities "did not diminish when . . . controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime." *Id.* at 1533-34; *see also* Catherine M. Grosso & Barbara O. O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 Ky. L.J. 651, 658 (2017) ("Prosecutors continue to exercise peremptory challenges at a significantly higher rate against black venire members than against all other venire members.").

Of particular relevance here, a study of 225 trials during the period 1992–2017 conducted by District Attorney Doug Evans—the district attorney who prosecuted Mr. Pitchford and Mr. Flowers—or one of his assistants in Mississippi's Fifth Circuit Court District revealed significant racial disparities. *See* Will Craft, APM Reports, *Peremptory Strikes in Mississippi's Fifth Circuit Court District* (2018), https://perma.cc/D4TY-27FV. Looking specifically at the capital context, the study concluded that "black jurors in capital murder trials were more than eight times as likely to be struck than white jurors," and "[b]eing black was the greatest predictor of being

struck in capital trials, even more than expressing hesitation about imposing the death penalty." *Id.* at 12. Across all 225 trials (including non-capital cases), the study revealed that prosecutors exercised peremptory strikes against Black prospective jurors at a rate nearly 4.5 times greater than that for prospective White jurors. *Id.* at 2. A review of a subset of 89 *voir dire* reports showed that "[r]ace remained a strong predictor of whether a juror would be struck after taking into account the race-neutral characteristics brought up in jury selection. Even more, no variable explained away the importance of race." *Id.* at 13.

Similar race disparities in the use of peremptory strikes by prosecutors have been documented in numerous other states and jurisdictions. *See* EJI Report at 42 (describing additional studies in Louisiana and California). The existence of persistent race disparities in jury selection in capital trials only amplifies the importance of ensuring that reviewing courts apply *Batson* consistent with this Court's precedents.

B. Racial Discrimination in Capital Juries Is Particularly Pernicious.

Capital juries bear more responsibility than non-capital juries because their decisions carry more dire consequences. As this Court has long acknowledged, the punishment of death is different from incarceration "in both its severity and its finality." *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (stating that "the penalty of

death is different in kind from any other punishment imposed under our system of criminal justice"). Because of this, citizens should have a necessarily "heightened" sense of responsibility when discharging their duty as jurors in a capital case. *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (cleaned up).

Studies have uncovered multiple ways in which racially diverse juries are apt to be better equipped to meet this "heightened" calling in capital cases. In determining the purely factual question of guilt or innocence, more diverse juries are more apt to reach evidence-based conclusions, as they "deliberate[] longer" and "consider[] a wider range of information." *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psych. 597, 606 (2006). These juries in turn "ma[k]e fewer factual errors" than non-diverse juries. *Id*. The differences in deliberation quality are particularly marked in cases involving Black defendants, as the deliberations of non-diverse juries have been found to be "overall of lower quality (i.e., fewer factual statements, decreased accuracy, and fewer novel contributions) when the defendant was Black (vs. White)." Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 Law & Hum. Behav. 232, 244 (2019).

After the guilt-innocence determination, capital juries have an even weightier task—the decision whether to sentence someone to death. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality

opinion) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Capital sentencing necessarily requires consideration and weighing of aggravating and mitigating circumstances. *See Gregg*, 428 U.S. at 206 (plurality opinion); *id.* at 211 (White, J., concurring) (upholding a statute requiring capital juries to "consider[] evidence of any mitigating circumstances or aggravating circumstances otherwise authorized by law" (internal quotation omitted)).

Recognizing the significance of a reliable, individualized sentencing determination in capital cases, this Court has ruled that juries may consider, "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). Studies have shown, however, that there are "racial differences in the use and misuse of mitigating evidence" and that this gap is wider for White jurors considering Black defendants. Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav. 481, 494 (2009) (discussing "the relative inability of White jurors to perceive Black capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors' own" (internal quotation omitted)). This gap widens further where the victim in the case is also

White. *Id.*; *see also* William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 193 (2001) ("The presence of five or more white males on the jury dramatically increased the likelihood of a death sentence in the [Black defendant, White victim] cases.").

C. Capital Cases Require Careful Adherence to *Batson*.

Jury diversity is not only more important in capital cases—it is also considerably harder to achieve. Pursuant to the practice of death qualification, prospective jurors may be removed for cause if they voice death penalty opposition "so strong that it would prevent or substantially impair the performance of their duties as jurors." *Lockhart v. McCree*, 476 U.S. 162, 165 (1986). This Court held in *Lockhart* that death qualification is "carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." *Id.* at 175-76. However, this practice has at least two significant practical effects on capital jury diversity.

First, death qualification disproportionately removes Black potential jurors from the jury pool, and did so here. *See id.* at 201 (Marshall, J., dissenting) ("Because opposition to capital punishment is significantly more prevalent among blacks than among whites, the evidence suggests that death

qualification will disproportionately affect the representation of blacks on capital juries."); *see also* Barbara O. O'Brien & Catherine M. Grosso, *The Costs to Democracy of a Hegemonic Ideology of Jury Selection*, 22 Ohio St. J. Crim. L. 63, 87-88 (2025) (analyzing jury selection in capital trials in Wake County, North Carolina between 2008 and 2019 and finding that Black venire members were excluded due to death qualification at more than twice the rate of their White counterparts). In other words, death qualification disproportionately reduces the number of Black people able to serve on a jury, making it more likely that capital juries will be non-diverse and vulnerable to the weaknesses discussed above, and making any violation of the *Batson* procedure particularly consequential.

Second, because of death qualification, Black prospective jurors are disproportionately vulnerable to pretextual, racially discriminatory peremptory strikes. The Court in *Lockhart* made clear that death scruples need not make prospective jurors excludable *for cause*, remarking,

> [i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases [because] those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart, 476 U.S. at 176. Though prospective jurors present after death qualification may have voiced disapproval of the death penalty, these prospective jurors necessarily communicated that they could fairly discharge their duty as capital jurors. After the death qualification process, then, the legitimate interest in compiling a jury that can follow the law is no longer of concern.

In practice, however, "[t]he death qualification process reveals a greater number of African Americans who voice reservations about the death penalty, giving prosecutors an ostensibly race-neutral basis for removing them" at the peremptory stage. Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 Law & Pol'y 148, 166-67 (2018). In other words, the capital context risks endowing a prosecutor with an additional, potentially pretextual, basis to exercise a peremptory strike against a Black prospective juror who remains eligible to serve after the death qualification process. While a prospective juror's negative views of or ambivalence about the death penalty may in some instances be a race-neutral justification for a peremptory strike, it also very well may function as a pretextual basis to strike Black prospective jurors but *not* White prospective jurors. *Cf. id.* at 166 ("When they operate in tandem, the process of death qualification and the targeted use of peremptory challenges to eliminate potential jurors with reservations about the death penalty greatly increase the odds that capital juries will be disproportionately (if not entirely) white."). In fact, that is precisely what happened in this case: The prosecutor peremptorily struck a Black prospective

juror who had made it through death qualification, purportedly because, in part, "he had no opinion on the death penalty," while not striking two White jurors who had expressed the same view of the death penalty. *See* Pet. Br. at 28 (citing JA1450-55, JA1462-67, JA1468-73).

These practical realities of capital jury selection make scrupulous adherence to *Batson* all the more important in capital cases. Mr. Pitchford's case illustrates the grave harms of ignoring this Court's clear dictates and calls upon this Court once again to make clear that the Constitution forbids race discrimination in jury selection.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, the Court should reverse the Court of Appeals and remand for the entry of judgment in Petitioner's favor.

Respectfully submitted,

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