No. 24-7351

In the Supreme Court of the United States

TERRY PITCHFORD, PETITIONER

v.

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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Mississippi Supreme Court, which determined that petitioner had failed to raise certain rebuttal arguments challenging the prosecutor's stated race-neutral reasons for exercising peremptory strikes in the trial court, permissibly declined to consider those arguments on appeal under the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. 2254(d).

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INTEREST OF THE UNITED STATES

This case presents the question whether an appellate court, in reviewing a claim of racially biased peremptory strikes of jurors under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), is required to consider rebuttals to a prosecutor's stated race-neutral justifications that the defendant did not present to the trial court. *Batson*'s framework applies in federal criminal proceedings through the equal protection component of the Fifth Amendment's Due Process Clause. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Accordingly, the United States has a substantial interest in the resolution of this case.

INTRODUCTION

During jury selection in petitioner's case, the trial court found that he had not carried his burden under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to show that the prosecution's peremptory challenges were racially discriminatory. Petitioner then raised a claim of *Batson* error on appeal, in which he made new arguments of prosecutorial pretext—involving specific comparisons between challenged and unchallenged jurors—that he had not made in the trial court. Invoking a preexisting procedural rule, the Mississippi Supreme Court declined to entertain those new arguments, on the ground that they had not been presented for the trial court's consideration. The adoption of that rule was well within the state supreme court's authority—particularly when subjected to deferential review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (28 U.S.C. 2254).

The *Batson* context is no exception to the "familiar" rule that "a constitutional right may be forfeited * * * by the failure to make timely assertion of the right." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). The proper functioning of the judicial system depends on parties raising arguments—especially fact-dependent ones—in the trial courts, which have the ability to consider those arguments in the first instance, build a proper record on them, and take any potential corrective action at the time it would be most useful. Various formal rules and doctrines have long enforced that salient practice. And even in the circumstances when appellate courts have discretion to consider unpreserved arguments, they frequently refrain from doing so.

That tradition readily encompasses an appellate court's adoption of a rule under which *Batson* pretext

arguments must be raised in the trial court at the time that the *Batson* objection is adjudicated. The trial court is in a much better position than an appellate court to evaluate the credibility of a prosecutor's stated race-neutral reasons for his peremptory challenges, and to address any problems before trial commences. After-the-fact pretext arguments lack the benefit of contemporaneous exploration, can be "very misleading" when presented to an appellate court on a cold record, *Snyder* v. *Louisiana*, 552 U.S. 472, 483 (2008), and attempt to undo a final conviction and sentence. Even if he is not sandbagging, a defendant has no entitlement to unravel the result of his trial based on an unpreserved pretext argument—let alone a right to relief in the postconviction posture in which petitioner's claim comes to this Court.

There is no basis to conclude that the Mississippi Supreme Court's decision was contrary to, or involved an unreasonable application of, law clearly established by this Court's cases, or that it was based on an unreasonable determination of facts. This Court should affirm.

STATEMENT

1. In November 2004, petitioner and Eric Bullins went to Crossroads Grocery in Grenada County, Mississippi, intending to rob it. J.A. 573-574. It was petitioner's second attempt to rob the store. J.A. 574. During the robbery, Bullins shot and killed the store's owner, Reuben Britt, with a .22 caliber pistol. *Ibid.* Britt also suffered wounds consistent with pellets from a second firearm containing "rat shot" cartridges. *Ibid.* Petitioner later confessed to his role in the fatal robbery, though he claimed to have fired his shots into the floor. *Ibid.* A Mississippi grand jury indicted petitioner for capital murder. J.A. 575.

a. Jury selection in petitioner's capital case began in February 2006. J.A. 575; see J.A. 5-176 (transcript of jury selection). The voir dire began with a venire of 96 potential jurors, of whom 61 were white and 35 were black. J.A. 575. Without objection from either party, the trial judge struck 55 prospective jurors for cause or other reasons, leaving 41, of whom 36 were white and five were black. J.A. 575, 717.

Petitioner used all 12 of his peremptory strikes on white venirepersons. J.A. 717. The prosecution used only seven of its 12 peremptory challenges, striking three white venirepersons and four black venirepersons. *Ibid.* In the midst of that process, after the prosecution had struck the fourth black venireperson, petitioner's counsel raised a claim of racially biased jury selection pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986). *Id.* at 89; see J.A. 167.

This Court has instructed that evaluation of a defendant's *Batson* claim consists of three stages. See, *e.g.*, *Johnson* v. *California*, 545 U.S. 162, 168 (2005). First, the defendant must make out a prima facie case of discrimination. *Ibid.* Second, if the defense has done so, the prosecution must offer race-neutral reasons for its strikes. *Ibid.* Third, the trial court must determine whether, under the circumstances, the defendant has met his burden to prove that the peremptory challenges were in fact purposefully discriminatory. *Ibid.*

Here, petitioner's counsel asserted "a pattern of striking almost all of the available African-American jurors" from what she described as "already a disproportionally white jury for the population of this county." J.A. 167-168. Petitioner's counsel also cited *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), as an example of a case in which this Court had "reversed a conviction" even

though the prosecution "had left either one or two black jurors on the venire." J.A. 168.

The trial court, "given the number of black jurors that were struck," requested a response from the prosecution. J.A. 168. The prosecution accordingly explained each peremptory challenge of a black juror:

- One had been "15 minutes late" returning to court and, according to the local police captain, "obviously has mental problems" observed during "numerous calls to her house." J.A. 169.

- Another had "a brother that has been convicted of manslaughter," which was a "similar offense[]" to the one at issue. J.A. 169.

- The third's brother "was convicted in this court of sexual battery" and was "now charged in a shooting case" and, "according to police officers, [the venireperson] is a known drug user." J.A. 170.

- The fourth was "too closely related" to petitioner in that he was "approximately the age" of petitioner, had similarly "never been married," and had "a two-year-old child," "about the same age" as petitioner's child. J.A. 170. He also "had no opinion on the death penalty" and had "numerous speeding violations." *Ibid.*

The trial court found each of the prosecutor's reasons to be "race neutral." J.A. 169-170.

Petitioner's counsel did not respond with any attempt to rebut the prosecutor's reasons for striking the prospective jurors. See J.A. 170-171. Nor did counsel argue that discriminatory intent could be inferred from the presence of white jurors with similar backgrounds or circumstances whom the prosecution had not challenged. See *ibid.*

Instead, the trial court and the parties proceeded with the peremptory-challenge process, during which the prosecution used two more peremptory strikes, each to remove a white venireperson. J.A. 171-174. The final set of 14 jurors, who would form the 12-member jury along with two alternates, consisted of 13 white members and one black member. J.A. 689, 717.

b. A short time after the conclusion of the peremptory-challenge process, before the jury was sworn, petitioner's counsel asked to approach the bench, and the following exchange took place outside the jury venire's hearing:

> [DEFENSE COUNSEL #1]: At some point the defense is going to want to reserve both its Batson objection and a straight [Fourteenth] Amendment racial discrimination.
>
> THE COURT: You have already made it in the record so I am of the opinion it is in the record.
>
> [DEFENSE COUNSEL #1]: I don't want to let the paneling of the jury go by without having those objections.
>
> THE COURT: I think you already made those, and they are clear in the record. For the reasons previously stated, first the Court finds there to be no—well, all the reasons were race neutral as to members that were struck by the district attorney's office. And so the, the Court finds there to be no Batson violation.
>
> And then as to the other issues, the Court has already ruled that based on prior rulings from the United States Supreme Court and the State of Mississippi that jury selection was appropriate.

> As I say, they are noted for the record.
>
> [DEFENSE COUNSEL #1]: Allow us to state into the record there is one of 12—of [14] jurors, are non-white, whereas this county is approximately, what, 40 percent?
>
> [DEFENSE COUNSEL #2]: The county is 40 percent black.
>
> THE COURT: I don't know about the racial makeup, but I will note for the record there is one regular member of the panel that is black, African-American race.
>
> [DEFENSE COUNSEL #1]: And only one.
>
> THE COURT: Right. There is one[,] period.
>
> [DEFENSE COUNSEL #1]: Right. Thank you.

J.A. 175-176.

Petitioner's counsel again made no mention of comparable white jurors who were not struck. J.A. 176. The jury was subsequently sworn in, and the trial (bifurcated into guilt and penalty phases) proceeded without any further argument with respect to the *Batson* challenge. J.A. 176, 576. The jury found petitioner guilty of capital murder. *Ibid.* A sentence of death was imposed. *Ibid.*

2. After the trial proceedings had concluded, petitioner filed a motion for a new trial, which raised 27 claims of error. J.A. 177-181. The motion included a single-sentence argument in support of a renewed *Batson* claim, in which petitioner asserted solely that the prosecution had used its peremptory challenges to obtain a jury "composed of less than 10% African-American citizens selected from a county with nearly a 45% African-American population." J.A. 179.

In an amended motion filed a week later, petitioner added a second sentence, asserting—without further elaboration—that 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." J.A. 184; see J.A. 182-187. The district court denied the motion for new trial without opinion. J.A. 3.

3. On appeal, petitioner again raised a *Batson* claim. J.A. 200-225. The Mississippi Supreme Court rejected that claim on the ground that it relied on arguments that petitioner had not raised before. J.A. 577-585.

Petitioner asserted on appeal that the prosecution's proffered race-neutral reasons for its peremptory challenges were pretextual on the theory that "some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike." J.A. 584. He sought to bolster that theory by arguing for the first time that, *inter alia*, the prosecution had accepted 11 white venirepersons who shared at least one demographic similarity with the fourth black venireperson challenged by the prosecution , J.A. 212 & n.9, and had accepted two white jurors with relatives who had been convicted of non-homicide felonies, J.A. 220, 222 & n.12.

Observing that petitioner "did not present these arguments to the trial court during the voir dire process or during post-trial motions," the Mississippi Supreme Court declined to "now fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented." J.A. 584-585. The Mississippi Supreme Court also quoted precedent in which it had held that the failure to raise a *Batson* pretext argument in

the trial court "constitutes waiver." J.A. 584 n.16 (quoting *Manning* v. *State*, 735 So. 2d 323, 329 (Miss. 1999)).

The Mississippi Supreme Court additionally found petitioner's argument that "the totality of the circumstances show[ed] that the State's peremptory challenges were exercised in a discriminatory manner" to be an "attempt to present his pretext argument in another package." J.A. 585. And it explained that because petitioner "failed to provide any argument concerning pretext during the *Batson* hearing," it would "not entertain those arguments" on appeal. *Ibid.*

Presiding Justice Graves dissented, joined by Justice Kitchens. J.A. 659-676. In Justice Graves's view, petitioner had "made a pretext argument by virtue of his *Batson* objection," J.A. 672, and the trial court had committed clear error in accepting the prosecution's race-neutral explanations for its strikes, J.A. 673-676.

4. Under 28 U.S.C. 2254, state prisoners who have exhausted available state remedies may file an application for a writ of habeas corpus in federal district court. See 28 U.S.C. 2254(b)(1)(A) and (c). In 2018, petitioner sought federal habeas relief in the United States District Court for the Northern District of Mississippi on 26 potential grounds, including a renewed *Batson* claim. See D. Ct. Doc. 36 (Sep. 17, 2018). The district court granted relief on that claim. See J.A. 687-711.

Under the AEDPA, a federal court may not grant habeas relief on a claim that was previously adjudicated on the merits by the state courts unless one of two conditions is met. Specifically, the state adjudication of the claim must have "resulted in a decision" either "contrary to, or [that] 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), or "based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. 2254(d)(2).

Here, the district court deemed the Mississippi Supreme Court's "rejection of [petitioner's] *Batson* claim" to have been "contrary to or an unreasonable application of clearly established federal law." J.A. 711. The district court acknowledged that the Mississippi Supreme Court had found that petitioner "waived any argument regarding pretext," J.A. 702, but the district court took the view that petitioner "*did* object to the [prosecutor's] explanations" at the bench conference. J.A. 704. The district court criticized the state trial court for "*seemingly* fail[ing] to conduct the third *Batson* inquiry." J.A. 703. And it reasoned that, in any event, "a defendant's failure to rebut the State's race-neutral reasons does not constitute waiver of a comparative analysis in capital cases." J.A. 708.

The district court additionally faulted the Mississippi Supreme Court for failing to address that court's own conclusion, in an appeal that it had resolved after the trial in petitioner's case, that the same prosecutor had committed a *Batson* violation with respect to a different defendant, Curtis Flowers. J.A. 708-710; cf. *Flowers* v. *Mississippi*, 588 U.S. 284 (2019) (decision postdating state proceedings in petitioner's case finding *Batson* error by same prosecutor during a later retrial of Flowers). Although the district court acknowledged that Flowers's case was not "dispositive" of petitioner's *Batson* claim, it deemed the case "informative" and a factor that "should have been examined in the state appellate court's consideration of [petitioner]'s *Batson* argument." J.A. 710.

5. The court of appeals reversed the grant of habeas relief, J.A. 716-732, identifying several errors in the district court's reasoning.

First, the court of appeals found that the district court had "erred in finding the trial court skipped *Batson*'s third step." J.A. 723. The court of appeals explained that no decision from this Court required the trial court "to make explicit findings concerning the validity of the State's proffered race-neutral reasons." J.A. 724. And the court of appeals observed that the state trial court had "implicitly found" no discrimination during the bench conference in which it "f[ou]nd[] there to be no *Batson* violation" and concluded that "jury selection was appropriate." J.A. 725.

Second, the court of appeals found that the district court had "erred by finding that [petitioner] did not 'waive' his pretext argument." J.A. 725. The court of appeals observed that this Court "has held that state courts may adopt rules concerning when *Batson* challenges may be raised." J.A. 726 (citing *Ford* v. *Georgia*, 498 U.S. 411, 423 (1991)). The court found no case law indicating that "relying on such waiver principles" in this case "was an unreasonable application of (or even inconsistent with) *Batson*." J.A. 727. And the court observed that petitioner's objection at the bench conference that the county was 40% black "was not remotely sufficient to raise an objection to the State's race-neutral reasons." *Ibid.*

Third, the court of appeals found that the district court had "erred by suggesting the Mississippi courts were obliged to consider the 'totality' of the facts bearing on [petitioner]'s pretext claims, including the facts in the *Flowers* litigation." J.A. 728. The court of appeals observed that "it is not clearly established that ha-

beas courts *must*, of their own accord, uncover and resolve all facts and circumstances that may bear on whether a peremptory strike was racially motivated when the strike's challenger has not identified those facts and circumstances.'" *Ibid.* (quoting *Ramey* v. *Lumpkin*, 7 F.4th 271, 280 (5th Cir. 2021), cert. denied, 142 S. Ct. 1442 (2022)).

The court of appeals noted that while this Court had found a *Batson* violation in the course of the *Flowers* litigation, it had done so "nine years after the Mississippi Supreme Court rejected [petitioner]'s *Batson* claim." J.A. 729. And it explained that "to the extent the district court thought the Mississippi courts should have considered the relevance of *state*-court decisions in *Flowers*, those are irrelevant under AEDPA." J.A. 730.

Finally, the court of appeals found that the district court had erred to the extent that it had viewed the state courts as making factual findings that would be unreasonable under 28 U.S.C. 2254(d)(2). The court of appeals emphasized that "[a]ll the [trial] judge had available to weigh against the State's race-neutral reasons was [petitioner]'s conclusory argument that 40% of the county was black" and his citation to *Miller-El*. J.A. 731. And the court of appeals observed that it "was not clearly unreasonable for the judge to find that such bare assertions failed to overcome the State's race-neutral reasons." J.A. 731-732.

SUMMARY OF ARGUMENT

Nothing in this Court's decisions, the Constitution, or sound principles of judicial administration requires an appellate court to entertain arguments of pretextual juror challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), that were not raised during the *Batson* proceed-

ings in the trial court. Instead, such arguments may properly—and beneficially—be held to the same type of preservation rules that courts apply to all sorts of constitutional and nonconstitutional claims. As the decision below correctly recognized, the Mississippi Supreme Court's invocation of such a rule here provides no basis for federal habeas relief from his state judgment.

I. Perhaps "[n]o procedural principle is more familiar" than the rule that "a constitutional right may be forfeited * * * by the failure to make timely assertion of the right." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). In keeping with that principle, federal and state appellate courts routinely decline to consider issues and arguments that were not presented to the trial courts below. This Court likewise frequently refuses to entertain new issues and arguments that have not been passed upon by courts below. Although appellate courts sometimes have discretion to consider such questions, that does not give parties an entitlement to such belated consideration.

The general practice of requiring parties to preserve issues and arguments serves important purposes, is consistent with the Constitution, and comports with historical practice. Such preservation requirements ensure that an appropriate record is made in the trial court and encourage the timely raising of issues before the trial court, where they may be resolved before—not after—the continuation of the litigation in the trial court. This Court's precedents make clear that such preservation rules are generally within the discretion of federal and state courts and raise no due-process concerns. Indeed, such rules are historically grounded, tracking centuries of legal tradition.

Pretext arguments under *Batson*, *supra*, fit squarely within that tradition. As this Court has explained, "the ultimate burden of persuasion" that the prosecution has struck prospective jurors for racially motivated reasons "rests with, and never shifts from, the opponent of the [peremptory] strike." *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (per curiam). Appellate courts may properly decline to consider arguments that the defendant did not marshal in the first instance in attempting to meet that burden of persuasion. A trial court's determination regarding the pretextual nature of the prosecution's stated race-neutral justifications for its strikes is fundamentally a credibility determination, which appellate courts are often ill-suited to second-guess on a cold record. Requiring contemporaneous objections ensures a fuller record for review, incentivizes parties to raise their objections before the court has conducted a trial, and eliminates the need for prosecutors or trial courts to preemptively rebut every argument a defendant could potentially later make.

Although this Court at times has conducted juror comparisons not presented below, it has never indicated that appellate courts are *required* to conduct such analyses where the objecting party has not preserved the argument. To the contrary, the Court has observed that "[u]ndoubtedly" a "state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal." *Ford* v. *Georgia*, 498 U.S. 411, 423 (1991). And simply establishing a prima facie case under *Batson* is insufficient to timely preserve a *Batson* claim that depends on new assertions of pretext in the prosecution's facially plausible race-neutral reasons for its strikes.

II. For those reasons, the Mississippi Supreme Court did not unreasonably apply or contravene this Court's clearly established law, or unreasonably determine the facts, as would be required for relief under 28 U.S.C. 2254(d). Its procedural rule requiring preservation of *Batson* pretext arguments is both permissible and practical. Petitioner fails to show that the rule has any legal infirmity, or that it resulted in the denial of a forum for his *Batson* claim. Nor does he show that it was unreasonable for the state supreme court to find that he had failed to preserve his pretext arguments in this case. This Court should affirm the denial of habeas relief.

ARGUMENT

This Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79, 96 (1986), sets forth a three-part procedure for evaluating a defendant's claim of racially discriminatory juror strikes. See *id.* at 96-98. "The first two *Batson* steps govern the production of evidence," *Johnson* v. *California*, 545 U.S. 162, 171 (2005), and the third governs the evaluation of that evidence—with the burden of persuasion at all times resting squarely on the defendant. See, *e.g.*, *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (per curiam). Nothing requires an appellate court to find fault with the denial of a *Batson* claim based on third-step arguments that were not presented to the trial court. As this Court has made clear, a defendant's *Batson* claim is not immune to procedural rules, under which appellate courts may, and frequently do, decline to consider arguments not raised below. The court of appeals correctly determined that the Mississippi Supreme Court's decision easily withstands deferential review under 28 U.S.C. 2254(d).

I. COURTS REVIEWING A CLAIM OF RACIALLY BIASED JUROR STRIKES ARE NOT REQUIRED TO CONSIDER UNPRESERVED ARGUMENTS REGARDING PRETEXT

A. Appellate Courts Are Not Generally Required To Consider Issues And Arguments That Were Not Raised Below

1. "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). Indeed, "[n]o procedural principle is more familiar * * * than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). "Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken." *Ibid.*

That is especially true for appellate courts presented with issues and arguments not raised in the trial court. "[A]s a general rule, our system 'is designed around the premise that parties * * * are responsible for advancing the facts and argument entitling them to relief.'" *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375-376 (2020) (brackets omitted) (quoting *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J. concurring in part and concurring in the judgment)). And the "procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). Among other things, "[q]uestions not raised below are ones on which the record is very likely to be inadequate, since it certainly was not compiled

with those questions in mind." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

2. In some circumstances, a statute or rule may foreclose appellate consideration of an issue or argument not properly preserved in the trial court. "In federal criminal cases," for example, "Rule 51(b)" of the Federal Rules of Criminal Procedure "tells parties how to preserve claims of error: 'by informing the court—when the court ruling is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting Fed. R. Crim. P. 51(b)). "Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error," unless the demanding requirements for plain-error relief under Rule 52(b) are satisfied. *Ibid.* Similarly, under Rule 12, failure to raise certain issues—including certain constitutional issues—in a timely pretrial motion forecloses later consideration of those issues by "a court" unless "good cause" is shown. Fed. R. Crim. P. 12(c)(3); see Fed. R. Crim. P. 12(b)(3).

In other circumstances, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). It is well settled, for example, that appellate courts "have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below." *Upper Skagit Indian Tribe* v. *Lundgren*, 584 U.S. 554, 560 (2018). There can also be "circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the

proper resolution is beyond any doubt or where 'injustice might otherwise result.'" *Singleton*, 428 U.S. at 121. And, at least in this Court, a party that has "properly presented" a "federal claim" is "not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

But an appellate court's discretion to consider an issue or argument not raised below does not give rise to any general entitlement to such consideration. See, *e.g.*, *Yee*, 503 U.S. at 538 (declining to consider new argument). To the contrary, in some circumstances, consideration of a new issue or argument will be an abuse of discretion. See, *e.g.*, *Singleton*, 428 U.S. at 121. Even outside of that, it is "[o]rdinarily" the case that "an appellate court does not give consideration to issues not raised below." *Hormel*, 312 U.S. at 556. And for recurrent scenarios, courts will sometimes crystallize that practice into a rule. See *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 99 (1993) ("The courts of appeals have significant authority to fashion rules to govern their own procedures.").

This Court, for example, has adopted a "traditional rule" that "precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). And it "will not entertain arguments not made below" absent "unusual circumstances." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 38 (2015). Courts of appeals have adopted similar forfeiture rules, such as the common rule against considering arguments raised for the first time in a reply brief. See, *e.g.*, *Stechauner* v. *Smith*, 852 F.3d 708, 721 (7th Cir.), cert. denied, 583 U.S. 876 (2017); *United States* v. *Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) (per curiam); *United*

States v. *Chase*, 466 F.3d 310, 314 n.2 (4th Cir. 2006). And the Court has recognized that similar state preservation rules are "a valid exercise of state power." *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955); see *id.* at 383 n.6 (citing examples).

3. Such preservation rules are generally consistent with the Constitution, as evidenced by this Court's repeated endorsements of "state procedural rule[s] which forbid[] the raising of federal questions at late stages in the case, or by any other than a prescribed method." *Williams*, 349 U.S. at 382-383; see *id.* at 383 n.6 (citing cases). In *Michel* v. *Louisiana*, 350 U.S. 91 (1955), for example, this Court upheld a state law that required challenges to a grand jury to be raised within three days of the grand jury's term ending or before trial, whichever was earlier. *Id.* at 92-93. The Court found it "beyond question that, under the Due Process Clause of the Fourteenth Amendment, Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights." *Id.* at 97. Similarly, in *Wainwright* v. *Sykes*, 433 U.S. 72, 86 (1977), the Court held that a State could, "consistently with the United States Constitution, require that [the defendant's] confession be challenged at trial or not at all." *Id.* at 86.

Far from being constitutionally problematic, this Court has recognized that preservation rules, applied in the context of constitutional claims or otherwise, are a boon to the system. The Court has explained, for example, that "[t]here is good reason" why "[i]f an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed." *Puckett*, 556 U.S. at 134. "[A]nyone familiar with the work of courts understands that * * * a reflexive incli-

nation by appellate courts to reverse because of unpreserved error would be fatal." *Ibid.* (citation and internal quotation marks omitted).

In addition to ensuring that an appropriate record is made, see *Cardinale*, 394 U.S. at 439, preservation rules also "induce the timely raising of claims and objections, which gives the [trial] court the opportunity to consider and resolve them." *Puckett*, 556 U.S. at 134. "That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Ibid.* If an objection is properly made in the trial court, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." *Davis* v. *United States*, 411 U.S. 233, 241 (1973). "And of course the contemporaneous-objection rule prevents a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett*, 556 U.S. at 134 (internal quotation marks omitted).

4. Preservation requirements also have deep historical roots. "The rule against considering new issues on appeal developed from the writ of error model of appellate review as it was handed down from eighteenth century English common law." Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 Ind. L. J. 985, 985-986 (1989). Because "the only purpose of appellate review" under that model "was to ascertain whether the judge made a mistake in a legal ruling," the "issue on which the writ of error was based had to have been presented to the trial judge." Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 6

(1990); see 3 William Blackstone, *Commentaries on the Laws of England* 405-406 (1768).

As one 19th-century commentator explained, a contemporaneous objection was required in order "to suggest to the court the objection, so that the court does not pass upon it inadvertently, and that the court or the party may have an opportunity to correct or obviate it." Thomas W. Powell, *The Law of Appellate Proceedings* 124 (1872). Such preservation rules applied in full force to challenges regarding jury composition. Although Congress eventually dispensed with writs of error in favor of appeals in 1928, Act of Jan. 31, 1928, ch. 14, 45 Stat. 54, and made formal "[e]xceptions to rulings or orders of the court * * * unnecessary" in 1946, Fed. R. Crim. P. 51 (1946), parties still had an obligation to preserve arguments on jury composition and other issues. See, *e.g.*, *Frazier* v. *United States*, 335 U.S. 497, 513 (1948) (holding that defendant "could not challenge" jurors for actual bias "in a motion for a new trial," when he had not challenged them before).

Indeed, as noted above, Federal Rule of Criminal Procedure 51—which requires a party to identify the "grounds" for an objection—was adopted in 1946 and continues in force today. Applying Rule 51, other preservation rules, and sound exercises of discretion to limit consideration of unpreserved arguments remains a permissible, valuable, and ubiquitous feature of the judicial system.

B. Appellate Courts Are Not, And Should Not Be, Required To Consider Unpreserved Pretext Arguments Added To Claims Under *Batson* v. *Kentucky*

As noted above, the lengthy pedigree of preservation rules includes the application of such rules to objections to jury composition. See, *e.g.*, *Kohl* v. *Lehlback*, 160

U.S. 293, 299 (1895) (noting that objection to juror's citizenship "may have been raised after verdict, and overruled because coming too late"); *United States* v. *Gale*, 109 U.S. 65, 69 (1883) (applying common-law rule requiring pretrial objections to grand-jury composition); *Queen* v. *Hepburn*, 11 U.S. (7 Cranch) 290, 297 (1813) (Marshall, C.J.) (applying rule that objection based on juror's county of residence "ought to have been made[] before the juror was sworn"). Both this Court's precedents and the commonsense administrative concerns that underlie other preservation rules allow for their application in the context of a claim of racially biased jury strikes under *Batson*.

1. As explained, a defendant's *Batson* claim proceeds in three stages. The first stage requires the defendant to make out a prima facie case by showing that the "relevant circumstances raise an inference that the prosecutor used" peremptory challenges "to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96. If he is able to do so, the second stage requires the prosecution to "come forward with a neutral explanation for challenging [allegedly targeted] jurors." *Id.* at 97. Finally, at the third stage, the trial court "ha[s] the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. And notwithstanding the shifting burdens of production, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from," the defendant who is "the opponent of the strike." *Purkett*, 514 U.S. at 768.

It is critical that the district court be apprised of, and thus able to consider, the facts and arguments by the time the inquiry reaches the third stage. At the first stage, a defendant need only raise an "inference" of

race-based peremptory strikes. *Batson*, 476 U.S. at 96. And at the second stage, the prosecutor's explanation need only be facially race-neutral, even if it is not "plausible" or "minimally persuasive." *Purkett*, 514 U.S. at 768. "It is not until the *third* step" that the trial court considers "the persuasiveness of the justification" and "determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Ibid.* Accordingly, it is incumbent on the defendant to ensure that the trial court is aware of any facts or arguments that should form part of its consideration.

It is the defendant, not the trial court, who bears "the ultimate burden of persuasion." *Purkett*, 514 U.S. at 768. He cannot simply assume that the trial court will carry that burden for him, by coming up with and considering on its own any variety of arguments that might be posited in his favor. The duty of the trial judge is to "determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual," *Flowers* v. *Mississippi*, 588 U.S. 284, 303 (2019), not to derive arguments on a defendant's behalf.

2. A defendant whose *Batson* claim was denied has no entitlement to appellate review of pretext arguments that he did not raise at the time. Although *Batson* protects the important right to be free from racial discrimination in jury selection, the *Batson* context is no exception to the general principle that courts may decline to consider unpreserved arguments. To the contrary, "[i]n *Batson* itself," the Court "imposed no new procedural rules and declined either 'to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges,' or to decide when an objection must be made to be timely." *Ford* v. *Georgia*,

498 U.S. 411, 423 (1991) (quoting *Batson*, 476 U.S. at 99-100). The Court instead "recognized that local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases." *Ibid.* (quoting *Batson*, 476 U.S., at 99 n.24).

"Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal." *Ford*, 418 U.S. at 423. Courts may likewise decline, either as a general matter or in specific cases, to consider new pretext arguments—like arguments that comparable venirepersons went unchallenged—that were not identified to the trial court during that court's consideration of the *Batson* claim. A simple *Batson* objection, standing alone, is not inherently sufficient to preserve such a belated argument. A *Batson* claim that reaches the third stage necessitates a fact-intensive inquiry into pretext. The belated injection—on appeal, after trial and conviction—of a new argument that was not provided to the trial court at the time of its fact-intensive ruling disserves the interest of justice.

Such late-introduced arguments implicate all of the traditional reasons why appellate courts may, and typically do, decline to entertain new arguments on appeal. As noted above, requiring contemporaneous airing of pretext arguments ensures that the trial court can make fully informed factual findings about the credibility of the prosecutor's race-neutral explanations for his peremptory challenges. This Court has made clear that the ultimate question of discriminatory intent under *Batson* is a "'finding of fact.'" *Batson*, 476 U.S. at 98 n.21 (citation omitted). Once a prosecutor provides his "reason for striking the juror," the trial judge must "assess the plausibility of that reason." *Miller-El* v. *Dretke*, 545

U.S. 231, 251-252 (2005). That will often depend on "[t]he trial judge's assessment[s] of the prosecutor's credibility." *Flowers*, 588 U.S. at 302.

"[D]eterminations of credibility and demeanor lie 'peculiarly within a trial judge's'"—not an appellate court's—"'province.'" *Flowers*, 588 U.S. at 303 (quoting *Snyder* v. *Louisiana*, 552 U.S. 472, 477 (2008)). Even when a basic *Batson* objection has been preserved, a trial court's credibility determinations are owed "great deference." *Batson*, 476 U.S. at 98 n.21. When the defendant fails to raise specific pretext arguments, he deprives the trial court of the opportunity to consider those arguments alongside other demeanor evidence—and to make an explicit record on which an appellate court might later rely. Among other things, a trial court, but not an appellate court, would be in position to simply ask the prosecutor to elaborate on his race-neutral explanation in light of the pretext argument raised by the defendant, and then evaluate the contemporaneous credibility of that elaboration.

Second-guessing of trial judges' credibility determinations based on arguments never called to those judges' attention is incurably speculative, and appellate courts have sound reason to avoid it. A defendant's failure to raise a pretext argument at trial can also give rise to other deficiencies in the appellate record. For example, a common pretext argument is that the prosecution did not strike jurors who were similarly situated to stricken jurors. See, *e.g.*, *Flowers*, 588 U.S. at 302. But unless the issue was raised in the trial court, the appellate court may lack a developed record for making the necessary comparison.

Even when the record might provide some basis for comparison between challenged and unchallenged veni-

repersons, it remains the case that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483. Because "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable," *ibid.*, an appellate court may lack confidence that it has the full picture of the situation. As petitioner notes (Br. 41-42), this Court in *Snyder* engaged in post hoc comparison, where "the shared characteristic" was "thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." 522 U.S. at 483. But many cases are not like that, and an appellate court may appropriately demur from an analysis for which a defendant did not lay enough foundation.

Requiring appellate courts to make post hoc determinations in every case would also create perverse incentives for defendants. Without the possibility of forfeiture, "[s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal," and "the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Davis*, 411 U.S. at 241; see, *e.g.*, *Puckett*, 556 U.S. at 134. Such sandbagging concerns are particularly pronounced in the *Batson* context, given that successful *Batson* claimants are entitled to "automatic relief" without showing any prejudicial effect on the trial. *Weaver* v. *Massachusetts*, 582 U.S. 286, 301 (2017); see *United States* v. *Hill*, 31 F.4th 1076, 1084 (8th Cir. 2022) (noting the "unique opportunities for sandbagging" in this context), cert. denied, 143 S. Ct. 1036 (2023). And even for defendants who would not intend to sandbag, it is important to maintain affirmative

incentives to air arguments fully at the most appropriate time.

Consideration of unpreserved pretext arguments on appeal also puts an unreasonable burden on prosecutors and trial courts. To fend off later-developed juror comparison arguments, "the prosecution w[ould] have to explain," for example, "why it kept *every* white juror, because it does not know which white jurors will be selected as comparators at some later date." *Chamberlin* v. *Fisher*, 885 F.3d 832, 843 (5th Cir. 2018), cert. denied, 588 U.S. 920 (2019). And a trial court would need to *sua sponte* conduct a time-consuming comparison between jurors who were struck and jurors who were retained, perhaps asking the prosecutor to explain his reasons for retaining specific jurors. Failing to do so could leave room for the defense to later conduct its own comparative analysis and potentially show error on appeal that would require a new trial and further expenditure of judicial resources.

3. Petitioner provides no sound reason, as either a legal or a practical matter, for such an undesirable outcome. He identifies no case in which this Court considered arguments that compared struck and non-struck jurors in the face of an explicit determination by a lower court that a defendant had failed to preserve such an argument. See Pet. Br. 41-44. This Court has never held that federal or state courts are required to consider unpreserved pretext arguments in *Batson* cases, and nothing precludes a court of appeals from exercising its discretion to do so.

Petitioner's reliance (Br. 41-42) on *Snyder* is misplaced. In that case—which involved a particularly full record, see p. 26, *supra*—the Court "reinforced" its conclusions about pretext by comparing the prosecutor's

stated reasons for a strike with the prosecutor's "acceptance of white jurors" who were similarly situated, even though those jurors "were never mentioned in the argument before the trial court." *Snyder*, 552 U.S. at 483, 489 (Thomas, J., dissenting). But the Court explicitly observed that "[t]he Louisiana Supreme Court did not hold that petitioner had procedurally defaulted reliance on a comparison of the African-American jurors whom the prosecution struck with white jurors whom the prosecution accepted." *Id.* at 483 n.2. "On the contrary," the Court explained, "the State Supreme Court itself made such a comparison." *Ibid.*

Petitioner also notes (Br. 42-43) that the Court in *Miller-El* v. *Dretke* rejected the dissent's view that "comparisons of black and nonblack venire panelists" were "not properly before th[e] Court, not having been 'put before the Texas courts.'" 545 U.S. at 241 n.2 (citation omitted). In doing so, the Court found "no dispute that the *Batson* claim was fairly presen[ted]" to the state courts, and observed that the "evidence on which" the comparison argument was based "was before the state courts" in the voir dire transcript, even if the defendant had not presented the same "theories about that evidence." *Ibid.* (citation and internal quotation marks omitted). But the Court did not hold that an appellate court has an *obligation*—as opposed to the *discretion*—to review such an unpreserved argument. See *Chamberlin*, 885 F.3d at 839 ("Nowhere in *Miller-El II* did the Supreme Court imply—let alone clearly establish—that a state court *must* conduct a comparative juror analysis *sua sponte*."); *McDaniels* v. *Kirkland*, 813 F.3d 770, 782-785 (9th Cir. 2015) (Ikuta, J., concurring) (observing that *Miller-El* "did not discuss, let alone squarely establish, a new procedural rule that

state courts must conduct comparative juror analysis when evaluating a *Batson* claim").

Contrary to petitioner's suggestion (Pet. 20), the requirement 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," *Snyder*, 552 U.S. at 478, does not override normal principles of party presentation and preservation. This Court made clear (in the very same case on which petitioner relies) that "the trial court must determine whether the defendant has shown purposeful discrimination" "*in light of the parties' submissions*." *Id.* at 477 (emphasis added; citation omitted). And nothing in this Court's precedents, or sound principles of judicial administration, requires an appellate court to find fault with a trial court's determination—and undo a conviction—based on an argument that was absent from those submissions.

II. PETITIONER PROVIDES NO JUSTIFICATION FOR SETTING ASIDE THE STATE COURTS' RESOLUTION OF HIS CASE

Petitioner identifies no sound basis for overturning the Mississippi Supreme Court's application of its rule precluding consideration of unpreserved pretext arguments in the context of a *Batson* claim. Under the AEDPA, petitioner is entitled to relief only if he shows under 28 U.S.C. 2254(d)(1) that the state court's resolution of the claim "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 shows under 28 U.S.C. 2254(d)(2) that resolution of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence pre-

sented in the State court proceeding." 28 U.S.C. 2254(d). He falls well short of that demanding standard.

A. No Legal Error Warrants Relief

Petitioner does not show any legal error, let alone the type of error required under Section 2254(d)(1)—namely, "an error * * * beyond any possibility for fair-minded disagreement," *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). For the reasons explained above, the Mississippi Supreme Court was not required to consider pretext arguments that petitioner did not raise during the trial court's consideration of his *Batson* claim.

As explained above, this Court has recognized as "clear" the "appropriateness in general of looking to local rules for the law governing the timeliness of a constitutional claim." *Ford*, 498 U.S. at 423. Even more specifically, it has recognized that a state court may "[u]ndoubtedly * * * adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal." *Ibid.* No decision of this Court forecloses a state, or federal, appellate court from exercising its discretion to adopt and apply a rule under which it will not consider *Batson* pretext arguments that were not aired in a timely manner. See *Cardinal Chem. Co.*, 508 U.S. at 99; *Williams*, 349 U.S. at 382-383.

Even if petitioner were correct in asserting (Br. 32-33) that the Mississippi Supreme Court's preexisting rule does not cover his case, he cannot show that the appellate court was required to consider forfeited arguments. Petitioner errs in contending (Br. 26) that the Mississippi Supreme Court exceeded the bounds of its procedural discretion by referring to trial-court omission as a "waiver." While this Court has in recent decisions distinguished between waiver ("the 'intentional

relinquishment or abandonment of a known right'") and forfeiture ("the failure to make the timely assertion of a right"), it has recognized that "jurists often use the words interchangeably." *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004) (citation omitted). Any imprecision in the Mississippi Supreme Court's terminology does not undermine its discretion to decline to consider arguments raised for the first time on appeal.

Petitioner also errs in asserting (Br. 20) that the Mississippi Supreme Court committed legal error by "depriv[ing] [him] of any state forum to consider all three steps of his *Batson* claim." Even if some forfeiture rule could be so unreasonable either on its face, or in its application, as to have that effect, that did not happen here. As even the state-court dissenters recognized, "the trial court ruled on the ultimate question of intentional discrimination." J.A. 663 n.139 (Graves, P.J., dissenting); see J.A. 674 ("The trial court then made its [step three] determination, and [petitioner] appeals that determination."). And petitioner identifies no decision of this Court requiring the trial court to have given him additional opportunities to make *Batson* pretext arguments. Cf. *Davis* v. *Ayala*, 576 U.S. 257, 267 (2015) (declining to decide whether a defendant's "federal constitutional rights were violated when the trial court heard the prosecution's justifications for its strikes outside the presence of the defense").

B. No Factual Error Warrants Relief

On the facts, petitioner has failed to "rebut[] the presumption of correctness by clear and convincing evidence," *Miller-El*, 545 U.S. at 240, as Section 2254(d)(2) requires.

Contrary to the dissenting state justices' view, J.A. 672, petitioner did not "ma[k]e a pretext argument by

virtue of his *Batson* objection." Pointing out a pattern of striking black jurors, as petitioner did here, can suffice to make out a prima facie case under *Batson*. And it may even suffice to show intentional discrimination, if the prosecutor provides reasons for his strikes that are not facially race-neutral, are ultimately implausible, or are otherwise not credible. See *Purkett*, 514 U.S. at 768. But it does not in itself preserve specific arguments about why those reasons might be pretextual. Petitioner's pretext arguments on appeal—in which he posited that "some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike," J.A. 584—were not presented in the trial court. As the court of appeals observed, petitioner's bare assertion that the county population was 40% black "was not remotely sufficient to raise an objection to the State's race-neutral reasons" for its peremptory challenges. J.A. 727.

The record also does not support petitioner's claim (Br. 32-33), that the trial court deprived him of a "meaningful opportunity" to timely raise the arguments that he ultimately raised on appeal. Petitioner asserts (Br. 45) that he "was turned away when he tried to explain" why the prosecutor's reasons should not have been credited. But the record does not reflect an attempt to rebut those reasons after the prosecutor offered them. See J.A. 169-170. Nor did the trial court "refuse[] to hear further argument" (Br. 2) when it returned to the *Batson* issue a short while later. Instead, the court merely observed that petitioner's initial *Batson* objection was "clear in the record," J.A. 175, and then allowed petitioner's counsel to make the additional argument that the jury was not reflective of the county's racial population, J.A. 176. The record does not show that the

trial court either cut off petitioner's counsel or prohibited counsel from making more arguments.

Petitioner suggests (Pet. Br. 45) that he could not "have presented a long-form juror analysis any sooner" because voir dire proceeded too quickly. But petitioner's counsel did not request an opportunity to present such an analysis. See J.A. 169-176. Moreover, petitioner's amended motion for a new trial, which clearly did provide an opportunity to "present[] a long-form juror analysis," did not include one, but instead simply alluded to a juror-comparison argument without identifying any of the purported comparators. J.A. 184 (asserting, without elaboration, that "the prosecution's state of mind was clearly discriminatory as it deselected black people from the jury panel who had the same familial, living, social or marital circumstances as whites who were not deselected"). Those purported comparators cannot be the basis for setting aside his conviction now.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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