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

REPLY BRIEF FOR PETITIONER

JESSICA L. ELLSWORTH
CATHERINE E. STETSON
JO-ANN TAMILA SAGAR
JOHANNAH CASSEL-WALKER
ERIC ROYTMAN-CASH
DARRYL E. WILLIAMS, JR.
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004

KATHERINE B. WELLINGTON
JACKSON B. SKEEN
HOGAN LOVELLS US LLP
125 High Street, Ste. 2010
Boston, MA 02110

JOSEPH J. PERKOVICH
Counsel of Record
PHILLIPS BLACK, INC.
PO Box 3547
New York, NY 10008
(212) 400-1660
j.perkovich@phillipsblack.org

JOSEPH C. WELLING
JOHN R. MILLS
PHILLIPS BLACK, INC.
100 N. Tucker Blvd, Ste. 750
St. Louis, MO 63101

J. SCOTT GILBERT
WATKINS & EAGER PLLC
The Emporium Building
400 East Capitol Street
Jackson, MS 39201

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 24-7351

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

REPLY BRIEF FOR PETITIONER

INTRODUCTION

"[R]eliance solely on the good faith of prosecutors is misguided in light of the history of peremptory challenges in the period between *Swain* and *Batson*." Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 Yale L.J. 187, 199 (1989). "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El* v. *Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). *Batson*'s three-step framework exists to ensure that courts scrutinize cases like this one—cases bearing obvious hallmarks of racial discrimination. *Cf. Whitus* v. *Georgia*, 385 U.S. 545, 546-47 (1967) (noting that designations identifying

black veniremen were "sufficient to support petitioners' claims of discrimination" in jury selection).

The Mississippi courts failed to carry out that constitutional obligation. The trial judge repeatedly assured Pitchford's counsel that his *Batson* objection had been preserved, and counsel reasonably relied on those rulings. The Mississippi Supreme Court then held that the objection was *not* preserved, deciding Pitchford affirmatively chose not to raise the very rebuttal arguments the trial court foreclosed. These errors demand relief. The State resists this result, but the State is wrong on the facts, wrong on the law, and wrong on the remedy.

On the facts, the State largely reimagines what took place at trial. The State claims (at 22) that defense counsel chose to remain silent despite "ample opportunity" to rebut the prosecutor's explanations. Yet the transcript shows that the trial judge directed counsel to move on immediately after declaring each Step 2 proffer to be race neutral, permitting no further discussion. And when defense counsel tried to revisit the *Batson* objection, the judge told her—*three times*—that the objection was already preserved. The Mississippi Supreme Court unreasonably ignored this key fact, an error so clear from the record that the State buries its response to Pitchford's top-line argument 34 pages into its brief.

The State's defense of the trial judge's purported Step 3 analysis is equally untethered to the record. The State asserts that the trial judge credited the prosecution's explanations and found no racial discrimination based on all relevant circumstances. But it does not (and cannot) quote the trial judge saying that, because the judge never did. What the judge said

was that the prosecution's reasons were "race neutral"—not that they were credible. Pet'r Br. 31-32. The distinction is not semantic. A prosecutor who struck a juror because of his race, but offered an arrest record as cover, would have given a race-neutral reason. *Batson*'s three-step inquiry exists to weed out that pretext, and it is incomplete without a credibility finding. Pet'r Br. 46-47; *see Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*) ("the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible").

On the law, the State concedes more than it defends. The State agrees that appellate courts *can* consider comparative juror analyses for the first time on appeal, and that in *Snyder* v. *Louisiana*, 552 U.S. 472 (2008), and *Miller-El II*, this Court endorsed that approach. The State's only response is that this Court has never held appellate courts *must* do so. In so arguing, the State pivots away from what the Mississippi Supreme Court actually held—that it *cannot* reverse based on arguments not raised below and the trial court *must* base its decision on the State's reasons alone. The Mississippi Supreme Court's categorical bar and misunderstanding of the trial court's duty are irreconcilable with *Snyder* and *Miller-El II*, and each failing is a sufficient basis for relief here.

On the remedy, the State mischaracterizes what Pitchford seeks. Pitchford asks this Court to reinstate the federal district court's judgment because, as the district court recognized, the Mississippi courts made egregious factual and legal errors that independently satisfy § 2254(d)(1) and (d)(2). Because a *Batson* violation is a structural error, the appropriate disposition is the one this Court ordered in *Miller-El II* and

Snyder: reversal and remand with instructions to enter judgment for Pitchford unless the State elects to retry him. The State's request to ship this case to the state courts defies the limits on a writ of certiorari to a court of appeals. This Court should reverse.

ARGUMENT

I. THE MISSISSIPPI SUPREME COURT'S WAIVER FINDING IS UNREASONABLE.

The Mississippi Supreme Court's waiver finding rests on a premise the record cannot sustain: that Pitchford *chose* not to rebut the prosecution's purportedly race-neutral proffers. The record demonstrates that the trial court never permitted Pitchford to do so and he reasonably relied on the judge's ruling that his objection was preserved. "Subsection 2254(d)(2)'s unreasonability standard 'is demanding but not insatiable,'" and Pitchford has met it. Amicus Br. of CAC, et al., at 20 (citation omitted).

A. The Mississippi Supreme Court Wrongly Presumed That Pitchford Had—And Declined—A Meaningful Opportunity To Rebut The Prosecution's Race-Neutral Explanations.

When Pitchford's counsel, Alison Steiner, objected to the prosecution's four consecutive peremptory strikes of black prospective jurors, the trial court began a *Batson* inquiry. But the court never finished it. Steiner made clear that *Batson* demands more than accepting facially neutral explanations—that the court must evaluate the credibility of those reasons in light of all facts and circumstances. JA169. The trial court never undertook that inquiry.

The trial court gave Pitchford no opportunity to rebut the prosecution's race-neutral proffers. The court accepted each explanation as "race neutral" and moved on—without pausing for defense argument, without inviting rebuttal, and without considering the totality of the circumstances to determine whether the strikes were discriminatory. Pet'r Br. 31-33; JA169-170. In doing so, the court curtailed Steiner's timely *Batson* challenges.

Moreover, the trial court assured Steiner *three times* that her *Batson* challenge was preserved, and she reasonably relied on these assurances in heeding the judge's unmistakable signaling to carry on. At the end of jury selection, Steiner re-raised two objections she had made during voir dire: (1) the "*Batson* objection" to the peremptory strikes, and (2) "a straight [Fourteenth] Amendment racial discrimination" objection arguing that the prosecution's for-cause strikes eviscerated the venire's fair cross-section of the community's minority population. JA175, JA161-162. When the trial judge stated the objections were "in the record," Steiner explained that she did not "want to let the paneling of the jury go by without" being heard on both issues. JA175. But the judge closed the door on further *Batson* discussion: "[F]irst," the judge stated, "all the reasons were race neutral as to members that were struck by the district attorney's office," "so * * * the Court finds there to be no *Batson* violation." *Id.* He then moved to "the other" objection—her "fair cross-section" argument, JA161-162—and allowed Steiner only to note the makeup of the jury and alternates and utter that the county was about 40% black. JA175-176.

A defense lawyer, especially one gearing up for a capital trial, must be able to rely on the trial judge's repeated assurance that an objection has been preserved. Otherwise, counsel would be forced to spell out every conceivable sub-argument or micro-objection associated with every objection—even after the judge has made clear he is uninterested in hearing further discussion on the question. Yet the Mississippi Supreme Court ignored the record to find Pitchford waived argument on his *Batson* challenge. *See* Pet'r Br. 34-39. That waiver finding was an unreasonable determination of the facts, and the State's response cannot salvage it.

B. The State's Defense Of The Mississippi Supreme Court's Waiver Finding Lacks Merit.

The State attempts to defend the Mississippi Supreme Court's waiver finding by distorting both the relevant question and the record—faulting Pitchford for not rebutting the prosecution's proffers, while ignoring the trial court's failure to carry out the requisite *Batson* analysis. The transcript shows no waiver. It shows judicial foreclosure of *Batson* Step 3.

1. The State argues (at 34-38) that the Mississippi Supreme Court's waiver finding must be reasonable because "[a] reasonable factfinder could conclude that petitioner failed to raise pretext arguments." But the question presented is not whether Pitchford raised pretext arguments at trial, but whether the failure to raise pretext arguments permits a waiver finding where, as here, the trial court forecloses the opportunity to raise pretext arguments. *E.g.*, *Berry* v. *State*, 703 So. 2d 269, 295 (Miss. 1997). The answer to that question is no.

The State faults (at 36) defense counsel for "continu[ing] with jury selection" after the trial court deemed the prosecution's explanations race neutral. But the State's account of the voir dire (at 35-36) omits the trial court's foreclosure of Pitchford's attempts to complete the *Batson* record. *See* JA175-176. As the record reveals, Steiner continued with jury selection because the trial court ordered her to do so, saying: "now we will go back and have the defense starting at [venire member] 37." JA170. This was the trial court's instruction to move on, which did not permit further argument by Steiner. The State distorts the record to lay blame with defense counsel rather than at its source—the same judge responsible for the misapplication of *Batson* in *Flowers*.

The State accuses (at 37) defense counsel of a "dramatic[]" reformulation of Pitchford's *Batson* claim "on appeal." The State thus repeats the state court's false suggestion that Steiner attempted to introduce new evidence of pretext on direct appeal. JA585; Resp. Br. 2, 21, 23-24, 25-26. But Pitchford offered no new evidence. His appellate arguments relied on the trial record, including: (1) the prosecution's peremptory strikes overwhelmingly against black potential jurors, Pet'r Br. 22-23; (2) the juror questionnaires, which revealed the prosecution refrained from striking white jurors who shared many characteristics of the black potential jurors it struck, Pet'r Br. 23-28; and (3) the prosecution's history of racially discriminatory strikes, Pet'r Br. 28-29; *see* JA332-353, JA551-572 (appendices to direct-appeal briefing). Nor did Pitchford change his central legal argument. His appellate arguments relied on the same case he cited to the trial court. *See Miller-El II*, 545 U.S. at 241; JA168 (Steiner

citing *Miller-El II* in support of *Batson* objection during voir dire); JA184 (citing *Miller-El II* in amended motion for new trial); JA201-207 (citing *Miller-El II* in direct-appeal briefing).

The only thing that changed on appeal was Pitchford's ability to discuss his comparative-juror analysis in briefing to a court that had not yet denied him an opportunity to present that argument. *See Dupree* v. *Younger*, 598 U.S. 729, 738 (2023) (a post-trial motion need not "relitigate an already-rejected legal argument" where it would be "futile"). And this Court's "traditional rule" recognizes that "parties are not limited to the precise arguments they made below," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted), when "a new argument" is offered "to support what has been [a] consistent claim," *Citizens United* v. *FEC*, 558 U.S. 310, 331 (2010) (citation omitted).

The State also repeatedly quotes (at 37, 38, 41) statements from state post-conviction proceedings, but they do not help the State. *See* RA38a-42a, RA77a. In her affidavit supporting the post-conviction pleadings, Steiner accepted (as she had to in that posture) that the Mississippi Supreme Court's waiver finding was the court's final word on the issue. But here, it is the state courts' waiver determination that is now before this Court. And on that question, Steiner's affidavit is irrelevant.

The only lawyer whose intent bears on this Equal Protection Clause violation is the prosecutor, and the record in this federal litigation below manifests critical indicia of his intent to discriminate in this case. ROA.16790-94, 16839-43 (prosecution's marked-up venire lists); *see also, e.g.*, ROA.16234-37, 16244-61

(Assistant District Attorney Hill's explanation in a 2022 deposition that racial denotations on venire lists were done for internal discussion purposes); ROA.16506, 16512-19 (District Attorney Evans's explanation in a 2022 deposition that denotations were made because of an unspecified "rule[]"); ROA.16582-95 (Evans's reasons for striking Mr. Ward, *e.g.*, because of where he lived and what he said in the voir dire (when he said nothing)).

2. The State repeats (at 39) the Mississippi Supreme Court's erroneous conclusion that Pitchford did not preserve his pretext arguments, despite his persistent *Batson* objections. The State fails to distinguish between preserving a *Batson* objection as a whole and preserving pretext arguments at *Batson* Step 3. Pet'r Br. 42-43.

Pitchford presented his pretext arguments to the Mississippi Supreme Court—the first state-court forum in which he had a meaningful opportunity to offer an argument rebutting the State's "race-neutral" reasons as pretextual. *Brown* v. *Davenport*, 596 U.S. 118 (2022), which the State cites (at 39) for the uncontroversial proposition that a party can forfeit an argument it never made, is not to the contrary. *Davenport* merely held that a state appellate court did not act unreasonably by declining to "identif[y] and adopt[]" a prejudice argument that the defendant *never presented* in the state courts. 596 U.S. at 145. Here, by contrast, Pitchford pressed his *Batson* objection repeatedly at voir dire, raised pretext in his motion for a new trial, and thoroughly ventilated his arguments on direct appeal. *See supra* p. 4.

The State's efforts to distinguish between preserving a *Batson* claim and preserving a rebuttal argument in support of a *Batson* claim rely on a false narrative. The Mississippi Supreme Court ignored salient facts when determining whether Pitchford intentionally relinquished a right to argue that the prosecution's race-neutral proffers were pretextual. Pet'r Br. 34-39. In particular, the Mississippi Supreme Court ignored what the trial court *said*. The court said nothing of waiver when it barred Steiner's request to complete her *Batson* argument. JA175. It said the exact opposite three times over: "You have already made it in the record so I am of the opinion it is in the record," and, again, "they are clear in the record." *Id*. Ignoring this fact (and others, *see* Pet'r Br. 31-39) was an unreasonable factual error irrespective of the State's legal arguments about how preservation works when there is a meaningful opportunity to preserve.

The State waves away (at 39-40) the trial court's assurance that Pitchford's objection was in the record because "his rebuttal arguments were not." Again, that ignores the trial court's refusal to hear rebuttal and conduct the Step 3 analysis, *see supra* p. 4—the critical step in *Batson*'s burden-shifting framework. *E.g.*, *Rice* v. *Collins*, 546 U.S. 333, 338-339 (2006). It also discounts Pitchford's reasonable reliance on the trial court's assurance: If litigants cannot trust a trial court's confirmation that an issue is preserved, they will be forced into discursive explanations of every objection each time it arises during trial. *See* Pet'r Br. 40.

3. When the State (at 40) finally acknowledges Pitchford's foreclosure argument, it has little to say. The State does not—because it cannot—point to any

place in the voir dire transcript where the trial court permitted Pitchford an opportunity to argue pretext.

The State maintains (at 40) that the trial court "patiently and thoughtfully worked with the parties and the venire members to select a jury." The record belies that assertion, as jury selection spanned *only a few hours*, an extremely short period for a death penalty case. Pet'r Br. 10; ROA.16262-63; *cf. Miller-El II*, 545 U.S. at 240-241, 254 (*five-week* voir dire); *Foster* v. *Chatman*, 578 U.S. 488, 493, 495-496 (2016) (conducting an "evidentiary hearing" on *Batson* objection).

The trial court's apparent patience at *some* points of the voir dire has no bearing on whether it allowed Pitchford to support his *Batson* challenge under his "ultimate burden of persuasion regarding racial motivation," which "rests with, and never shifts from, the opponent of the strike." *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (citing *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993)). The trial court may have been "patient[]" when examining the parties' for-cause challenges, but the transcript reveals that the court rushed the *Batson* inquiry—and in doing so, omitted Step 3 altogether. That error, and the Mississippi Supreme Court's refusal to correct it, contravenes this Court's precedent. *See Snyder*, 552 U.S. at 476-477.

The United States halfheartedly claims (at 32) that the trial court "allowed petitioner's counsel to make [an] additional" *Batson* argument after the jury was impaneled, but she chose only to note "that the jury was not reflective of the county's racial population." That confuses the record. When Steiner renewed her distinct *Batson* and "fair cross-section" objections (JA161-162) at the close of jury selection, the trial judge twice assured Steiner that the *Batson* challenge

was preserved and explained he had overruled it because "all the reasons were race neutral as to members that were struck by the district attorney's office." JA175. The judge then moved on to "the other issues"—Steiner's separate arguments that the for-cause strikes rendered the venire unrepresentative of Grenada County. *Id.* Thus, the trial judge did not allow "additional argument" on *Batson*—he expressly ended that discussion and moved to a *different* objection.

In all events, the trial judge's failure to delay the jury's impaneling on counsel's request, *see id.*, made that exchange meaningless, because under Mississippi law, all *Batson* challenges must be adjudicated "prior to the impaneling of the jury." *Gaskin* v. *State*, 873 So. 2d 965, 968 (Miss. 2004). The record demonstrates the trial judge never allowed Steiner to argue pretext, so there can be no waiver.

II. THE MISSISSIPPI SUPREME COURT'S APPLICATION OF FEDERAL LAW IS UNREASONABLE.

The Mississippi Supreme Court compounded its factual errors by applying this Court's *Batson* precedents in ways this Court has expressly rejected. The Mississippi Supreme Court imposed a categorical bar on comparative-juror analysis on appeal and approved a truncated *Batson* inquiry—both in direct conflict with this Court's caselaw.

A. The Mississippi Supreme Court Unreasonably Applied Federal Law In Holding That It Cannot Consider Comparative Juror Analysis For The First Time On Appeal.

1. The State agrees (at 29) that appellate courts can and do consider comparative juror analyses for the first time on appeal. And it agrees (at 30-31) that this Court has reversed state-court decisions based on comparisons "not raised at trial," using "evidence of discrimination that was recorded in the transcript of voir dire." (alterations and quotation marks omitted). That should end the matter. The Mississippi Supreme Court concluded that it lacked the authority to conduct a comparative juror analysis, Pet'r Br. 42, and the State now concedes the court had that authority. *See also* U.S. Br. at 25-26 (making the same concessions).

The State instead reframes the (d)(1) inquiry, asserting that the Court has never held that appellate courts "*must* consider comparative-juror arguments first raised on appeal." Resp. Br. 29 (emphasis added). But this Court has plainly held that where the record shows "particularly striking" evidence of racial discrimination, an appellate court *may* undertake "a retrospective comparison of jurors based on a cold appellate record" and find that the court below "committed clear error." *Snyder*, 552 U.S. at 478, 483; *see Miller-El II*, 545 U.S. at 241 n.2. The Mississippi Supreme Court applied an incompatible rule, explaining that "Mississippi appellate courts * * * '*may not* reverse' a trial court's rejection of a *Batson* claim based on pretext arguments that the defendant failed to timely

raise to the trial court." Resp. Br. 5 (emphasis added; citation omitted) (collecting cases).

In other words, the court below believed it may *never* consider such analysis for the first time on appeal, while this Court has held it is *sometimes* appropriate to do so. Reading "may" as "may not" is plainly unreasonable.[*]

As Pitchford has explained, *see* Pet'r Br. 35-36, Mississippi's stringent *Batson*-waiver rule is flatly inconsistent with this Court's clearly established rules for the waiver of fundamental constitutional rights. Indeed, this Court has been "unyielding in [its] insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.' " *Illinois* v. *Rodriguez*, 497 U.S. 177, 183 (1990) (citations omitted) (collecting cases). In this context, courts must "indulge every reasonable presumption *against* waiver." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added; citation omitted). And that federal-waiver rule is especially important here because it "vindicate[s] the rights of 'challenged jurors' as much as defendants." Amicus Br. of NAACP LDF

---

[*] Moreover, this Court has relied on appellate consideration of these arguments in deciding *Batson* cases. *See Snyder*, 552 U.S. at 478 ("[I]n reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity *must* be consulted." (emphasis added)). Indeed, as *Snyder* demonstrated, the ultimate credibility finding on the prosecutor's race-neutral explanations often derives from consultation of factors the parties have not pressed. *Snyder*, 552 U.S. at 478 (observing considerations not raised by the parties, including trial judge's lack of explanation in permitting a challenged strike, doubts as to other strikes, and comparative juror analysis in this Court different from petitioner's own argument); *see also, e.g.*, *Andrew* v. *White*, 604 U.S. 86, 87-88, 92 (2025) (per curiam).

at 28-35. Yet the Mississippi Supreme Court puts its thumb on the other side of the scale—treating waiver as the default, even when the trial judge assured defense counsel the federal right was preserved and counsel reasserted the violation in motions for new trial.

2. The State fares no better attempting (at 29-32) to recast *Snyder* and *Miller-El II* as consistent with the Mississippi Supreme Court's decision. True, *Snyder* acknowledged that retrospective comparisons "*may be* very misleading," 552 U.S. at 483 (emphasis added), but *Snyder* and *Miller-El II* both relied on such analyses, demonstrating they can be done where the record so permits. *Id.*; *Miller-El II*, 545 U.S. at 241 n.2. Those holdings are incompatible with Mississippi's categorical bar.

The State asserts (at 29-31) that the habeas petitioners in *Miller-El II* and *Snyder* did more to preserve their arguments than Pitchford, but the opposite is true. In *Snyder*, although defense counsel was afforded ample opportunity to argue pretext, they did not do so in the trial court, on direct appeal in the state supreme court, or even in Snyder's initial appeal to this Court. Rather, they raised comparisons for the first time only after this Court remanded. *State* v. *Snyder*, 942 So. 2d 484, 496 (La. 2006), *rev'd*, 552 U.S. 472 (2008); *Snyder*, 552 U.S. at 489 (Thomas, J., dissenting). The petitioner in *Miller-El II*, meanwhile, "presented only generalized evidence of historical discrimination" to the state courts. 545 U.S. at 284 (Thomas, J., dissenting). It was not until his federal habeas proceedings that he presented arguments based on "[t]he questionnaires of * * * 98 veniremen."

Id. at 282-283. Pitchford, by contrast, developed a fulsome comparative analysis at the first opportunity before the Mississippi Supreme Court.

Ultimately, the State "conflates the difference between evidence that must be presented to the state courts" and "theories about that evidence." *Miller-El II*, 545 U.S. at 241 n.2. As in *Miller-El II* and *Snyder*, Pitchford "bases his [appellate] arguments" on evidence that "was before the state courts," including juror questionnaires and the voir dire transcript. *Id.* The State's real objection (at 27-28) is that Pitchford did not present his *theories* about that evidence at jury selection. But this Court has repeatedly held that such an omission does not bar consideration of those theories on appeal or, for that matter, in habeas corpus.

3. The United States says (at 16-21) that contemporaneous-objection rules are a common feature in American law, tracing back to the common-law writ of error. But there is no question Pitchford contemporaneously raised a *Batson* objection. Pet'r Br. 31-33.

The United States ignores, moreover, another fundamental principle of American law, which permits appellate courts to reverse based on errors "so clear from the trial record that despite a failure to point out the error at trial," "there could be no question as to the proper resolution of the matter." Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 Ind. L. J. 985, 999 (1989). Appellate courts may thus reverse where—as here, Pet'r Br. 22-28—"a plain error was committed in a matter so absolutely vital" to the defendant's fundamental rights. *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896); *accord United States* v. *Atkinson*, 297 U.S.

157, 160 (1936) (collecting cases). And in doing so, an appellate court "may consider the *entire* record." *Greer* v. *United States*, 593 U.S. 503, 511 (2021); *cf. Flowers* v. *State*, 947 So. 2d 910, 927 (Miss. 2007).

Contrary to the State's position (at 27), allowing appellate courts to consider—in appropriate circumstances—comparisons drawn from the trial record does not create perverse incentives; it merely prevents an indefensible categorical bar like Mississippi's. *See* Amicus Br. of Mississippi Legislative Black Caucus at 10 & n.36. A defendant who seeks a fair jury has every reason to press robust *Batson* arguments in the moment. And the prospect of prevailing in some future appeal years down the line hardly incentivizes a defendant to go to trial with a jury shaped by discrimination. *See, e.g.*, *Henderson* v. *United States*, 568 U.S. 266, 276 (2013) ("If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' *later*, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.").

4. The State likewise cannot save the Mississippi Supreme Court's decision by framing it (at 27-28) as a procedural rule operationalizing *Batson*. State rules implementing *Batson* must still "comply with" this Court's precedents. *Johnson* v. *California*, 545 U.S. 162, 168 (2005). Mississippi's categorical bar flouts them. Pet'r Br. 41-44.

The State's waiver cases (at 28) cut *against* the Mississippi Supreme Court's ruling, not in its favor. Many of those cases state that comparative analysis is appropriate on plain-error review if "the record on appeal clearly establishes as a matter of law that the [State's] neutral explanation was pretextual." *State* v.

Diggins, 836 N.W.2d 349, 356-357 (Minn. 2013) (citation and emphasis omitted). The few cases that purport to forbid such review either predate *Miller-El II* and *Snyder*, *see, e.g.*, *State* v. *Taylor*, 944 S.W.2d 925, 934 (Mo. 1997), or they make the same mistake as the Mississippi Supreme Court—relying on pre-*Miller-El II* and *Snyder* precedent, *see, e.g.*, *State* v. *Porter*, 491 P.3d 1100, 1107-08 (Ariz. 2021).

B. The Mississippi Supreme Court Unreasonably Applied Federal Law By Approving The State Trial Court's Truncated *Batson* Analysis.

The State concedes that at *Batson* Step 3, a trial court must consider all relevant circumstances and determine whether the prosecutor's strikes were motivated by race. But it insists that the trial court did that. In the State's telling (at 1), "the trial judge * * * credit[ed] [the prosecutor's] explanations and rule[d] that petitioner failed to prove discrimination." The trial court reached this conclusion, according to the State (at 33), based on "relevant circumstances," including "petitioner's presentation on numbers, the State's explanations, and petitioner's failure to dispute any of those explanations." Further, the State characterizes the trial court as having found the proffers not only race neutral, but "credible." *Id.*

The State does not quote the trial transcript to support these conclusions, because the judge did not say any of that. Rather, the judge treated "the State's recitation of race-neutral reasons as the end of the matter." Amicus Br. of Linda Lee, et al., at 19. Indeed, the only reference to "relevant circumstances" in the voir dire transcript is *Pitchford's counsel* reminding the court of its *Batson* obligations. JA167-169 ("[T]he

Court must make a determination on the basis of all relevant circumstances to racial discrimination."). What is more, when Steiner re-raised *Batson*, the trial judge plainly stated that he found "no *Batson* violation" because "all the reasons were race neutral as to members that were struck by the district attorney's office." JA175. The court thus confirmed that its ruling turned simply on the finding of race-neutrality at Step 2—not a consideration of all relevant circumstances at Step 3. *See Miller-El I*, 537 U.S. at 331-335; Amicus Br. of ACLU, et al., at 13-14.

Contrary to the State's assertions (at 33), Pitchford does not argue that the state must "affirmatively elicit[] rebuttal from defense counsel." Rather, the judge must *permit* argument at Step 3, so that a defendant has a meaningful opportunity to meet his "burden of persuasion" under "*Batson*'s burden-framework." *Rice*, 546 U.S. at 338, 342 (citation omitted). Indeed, "a defendant cannot intentionally relinquish a right he was never given an adequate opportunity to exercise." Amicus Br. of Fair and Just Prosecution, et al., at 8 (citing *Freytag* v. *Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment). Where a trial judge cuts off defense counsel after finding the prosecutor's reasons facially race-neutral, prevents her from responding, and assures her that the objection is preserved—three times—an appellate court cannot later find that she purposefully relinquished making a more robust argument.

At bottom, when comparisons are raised for the first time on appeal because of a trial court's Step 3 error, the appellate court must either consider them or va-

cate for the trial court to do so. The Mississippi Supreme Court did neither. That is unreasonable, and AEDPA demands reversal.

III. HABEAS RELIEF IS WARRANTED.

The State closes (at 42-43) by casting doubt on how the Court should go about righting the wrong committed by the Mississippi state courts. To be clear, Pitchford is seeking the same remedy that this Court has imposed in other analogous cases: A remand to the lower federal courts with instructions to grant habeas relief. *See Miller-El II*, 545 U.S. at 266.

1. The State accuses (at 42) Pitchford of asking the Court to "decide the merits" of his claim that the challenged strikes were based on race. Pitchford has made no such request.

From cover to cover, Pitchford's brief is focused on the narrow question before the Court: Whether the Mississippi Supreme Court's application of the law or determination of the facts was "unreasonable" such that the requirements of § 2254 are met. On the factual question, Pitchford argued that the Mississippi Supreme Court's finding that Pitchford somehow waived his *Batson* claim belied the record before that court. *See* Pet'r Br. 35-39 ("That factual determination is objectively unreasonable several times over." (citation and quotation marks omitted)).

On the legal question, Pitchford argued that the state courts violated *Batson* by failing to adhere to this Court's clear and repeated announcement that *Batson* establishes a three-step process for a trial court to adjudicate a claim that a peremptory challenge was based on race. *See* Pet'r Br. 47-49 ("[E]nding the *Batson* analysis full-stop after only completing Step 2 is an unreasonable application of federal law."

(quotation marks omitted)). At no point did Pitchford suggest relief was warranted on some other basis.

The State faults (at 42) Pitchford for describing the specific strikes in his case, but Pitchford is allowed to explain to this Court how the prosecutor violated *Batson*—just as the same prosecutor did in *Flowers*. That is indispensable context for this Court. Although the question before this Court is focused on whether the state court's determination was unreasonable, it is material that the evidence of a *Batson* violation in this case indeed was—and remains—compelling. *See* JA667-671 (Graves, P.J., dissenting) (detailing Pitchford's pretext arguments); JA705-708 (Mills, J., granting habeas relief) (same).

In any event, the State's brief makes clear the dangers of cutting the three-part *Batson* inquiry short. The State tries to pick off (at 44-49) each strike in isolation. But as this Court has repeatedly explained, *Batson* Step 3 requires examining "all of the circumstances that bear upon the issue of racial animosity," *Snyder*, 552 U.S. at 478, to determine whether the defendant has "established purposeful discrimination," *Miller-El II*, 545 U.S. at 239 (citation omitted). This is especially true where the prosecutor has a documented pattern of racial discrimination, offers thin and untested explanations, and declines to question jurors on alleged concerns. *See Snyder*, 552 U.S. at 478 (noting that any "persisting doubts" as to discriminatory intent regarding one challenge must be considered "for the bearing it might have" on the next challenge, and the one after).

The State does not rebut Pitchford's argument that under *Miller-El II*, a strike rationale unsupported by voir dire development suggests the prosecution's

stated concerns are not credible. 545 U.S. at 246. And the State's fallback—that Pitchford didn't "demand evidence" substantiating some of the prosecution's proffers, Resp. Br. 46-47—confirms the Step 3 problem: *Batson*'s framework was designed to prevent treating the prosecutor's untested allegations as self-proving. Trial courts are tasked, instead, with evaluating whether the prosecution's proffered justifications—in light of all the relevant circumstances—were credible, or whether the strikes were purposeful discrimination. *See Purkett*, 514 U.S. at 767 (at "step three," "*the trial court must then decide* * * * whether the opponent of the strike has proved purposeful racial discrimination" (emphasis added)).

2. Pitchford's requested relief—for this Court to "reverse the judgment of the court of appeals and remand for the entry of judgment in Pitchford's favor," Pet'r Br. 52—is not the windfall the State suggests. It is the only path forward.

"*Batson*," both in substance and procedure, is an "automatic reversal precedent[]." *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009); *see Weaver* v. *Massachusetts*, 582 U.S. 286, 301 (2017) (noting this Court has treated *Batson* errors as if they were structural).

Reversing and remanding for the entry of judgment is standard practice. Doing so would simply reinstate the relief ordered by the district court before the Fifth Circuit's backtrack. *See, e.g.*, *Miller-El II*, 545 U.S. at 266 ("revers[ing]," and "remand[ing]" to prior court "for entry of judgment for petitioner together with orders of appropriate relief"); *Snyder*, 552 U.S. at 486 ("revers[ing]," and "remand[ing]" the case to prior court "for further proceedings not inconsistent with [the Court's holding that *Batson* was violated]").

It is *the State's* request for some lesser relief (at 42-43) that would depart from this Court's procedure. And the State knows that. Tellingly, the State agrees that should this Court recognize the unreasonableness of the state-court decision, the proper course would be to remand the case. Resp. Br. 42-43. It quibbles only over where that remand should be routed.

The answer to that question is clear: the proper remedy would be to return the case to the lower federal courts with instructions to enter judgment consistent with this Court's holding that § 2254's requirements are satisfied. That is the only disposition that makes sense. If this Court holds that the state-court judgment was based on an unreasonable determination of fact, *Miller-El II* provides the roadmap. *See* 545 U.S. at 266 (remanding with instructions to grant habeas relief after concluding § 2254(d)(2) was satisfied). Similarly, if this Court's decision turns on the state courts' unreasonable application of federal law, Pitchford's conviction would *have to* be vacated. *See Rivera*, 556 U.S. at 161.

The State does not offer a single example where this Court remanded to a state-court system in a case arising under § 2254. Nor does it offer a persuasive reason to break new ground. In any event, it is unclear why the destination would make a difference, especially for a case tried twenty years ago. *Cf. Snyder*, 552 U.S. at 486 (remanding to state court after direct review, observing the absence of "any realistic possibility that this subtle [pretext question] could be profitably explored further on remand at this late date, more than a decade after petitioner's trial"). Pitchford did not receive a fair trial, and he did not receive a fair appeal. This Court should reverse.

CONCLUSION

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

Respectfully submitted,

JESSICA L. ELLSWORTH
CATHERINE E. STETSON
JO-ANN TAMILA SAGAR
JOHANNAH CASSEL-WALKER
ERIC ROYTMAN-CASH
DARRYL E. WILLIAMS, JR.
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004

KATHERINE B. WELLINGTON
JACKSON B. SKEEN
HOGAN LOVELLS US LLP
125 High Street
Suite 2010
Boston, MA 02110

JOSEPH J. PERKOVICH
Counsel of Record
PHILLIPS BLACK, INC.
PO Box 3547
New York, NY 10008
(212) 400-1660
j.perkovich@phillipsblack.org

JOSEPH C. WELLING
JOHN R. MILLS
PHILLIPS BLACK, INC.
100 N. Tucker Blvd, Ste. 750
St. Louis, MO 63101

J. SCOTT GILBERT
WATKINS & EAGER PLLC
The Emporium Building
400 East Capitol Street
Jackson, MS 39201

Counsel for Petitioner

MARCH 2026