No. 24-7351

Supreme Court of the United States

TERRY PITCHFORD,
Petitioner,

v.

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

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

BRIEF OF ALABAMA AND 19 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* STATES

The States of Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Florida, Kansas, Louisiana, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and West Virginia submit this brief in support of Respondents.

Amici States have strong interests in the administration of criminal justice, the finality of their state-court convictions, and the proper application of 28 U.S.C. § 2254(d). In our federal system, state courts are trusted to identify and correct violations of a defendant's federal rights. States facilitate their review with varying procedures, which are presumptively proper. Far from an outlier or an attempt to thwart Petitioner's rights, the waiver ruling challenged here reflects a common mechanism for implementing *Batson v. Kentucky*, 476 U.S. 79 (1986). Because a *Batson* claim turns on credibility determinations not easily second-guessed on appeal, state and federal courts have developed preservation doctrines that encourage full litigation at trial. Those rules fall comfortably within the discretion *Batson* left to the lower courts for enforcing equal protection in jury selection. *Amici* States have a vital interest in their continuing authority to adopt sensible procedural rules like the one at issue here.

SUMMARY OF ARGUMENT

I. When reviewing a *Batson* challenge to the use of peremptory strikes, the "credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Hernandez v. New York*, 500 U.S. 352, 367 (1991) (plurality). Because evaluating "demeanor and credibility lies peculiarly within a trial judge's province," *id.* at 365, appellate courts should sustain a trial court's ruling "in the absence of exceptional circumstances," *Davis v. Ayala*, 576 U.S. 257, 274 (2015). Given this framework, it makes perfect sense that many state and federal courts have adopted waiver rules like Mississippi's. These rules encourage claims of purposeful discrimination to be brought and developed before the decision-maker best situated to identify and correct discrimination. Petitioner's anti-waiver rule, by contrast, would encourage sandbagging, prejudice the prosecution, and force appellate courts to make an all-or-nothing choice years after the error could have been corrected. Some jurisdictions may choose to hear new *Batson* arguments on appeal, but nothing in *Batson* or its progeny suggests that course is required or even desirable.

II. Petitioner argues that if his claim survives AEDPA's relitigation bar, this Court should order that he "be released" because "*Batson* is an 'automatic reversal precedent.'" Pet. Br. 50-51. But habeas relief is an exercise of equitable discretion, never "automatic." The Court should also reject the suggestion of Petitioner's *amici* that equity means "mercy" and weighs "in only one direction" "to the advantage of prisoners." Scholars Br. 7, 10, No. 24-7351 (Feb. 4, 2026).

ARGUMENT

I. Waiver Rules Recognize and Preserve the Singular Role of the Trial Judge to Enforce *Batson v. Kentucky*.

In *Batson v. Kentucky*, the Court interpreted the Equal Protection Clause to prohibit "purposeful discrimination" in the use of peremptory strikes. 476 U.S. 79, 98 (1986). Whether a prosecutor exercised strikes with an illicit intent is a question of pure "fact" that "largely will turn on evaluation of credibility." *Id.* at 98 n.21. "There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney[.]" *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (plurality). Thus, "the job of enforcing *Batson*" must "rest[ ] first and foremost with trial judges." *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019). In turn, the job of the defendant must be "to present … evidence to support [the] claim" to the person with "primary responsibility" to decide it. *Id.* at 301-02.

A regime that permits piecemeal *Batson* claims, *i.e.*, claims raised partly at trial and partly on appeal, is strictly inferior to one that promotes complete preservation. If the defendant withholds evidence or arguments at trial, there will *never* be an opportunity to weigh them alongside "the best evidence." The only decision-maker who has that evidence, the trial judge, is deprived of "the totality of the relevant facts," *Hernandez*, 500 U.S. at 363, and what the appeals court gains from the defendant's belated development of his claim cannot substitute for firsthand observations of the prosecutor and the potential juror. To be sure, appellate courts *can* hear piecemeal claims, but it

doesn't follow that they "*must*." Resp. Br. 29; *contra* Pet. Br. 41-44. And there's nothing in the Constitution or the doctrine to commend a system that promotes piecemeal claims, rather than encouraging the fullest presentation possible when the claim arises at trial.

Accordingly, many state and federal jurisdictions have adopted sensible preservation rules. These rules fall well within the realm of discretion accorded to lower courts for implementing *Batson*, 476 U.S. at 99 & n.24, and certainly within the realm of reasonability needed to satisfy AEDPA, 28 U.S.C. §2254(d)(1).

A. *Batson* Entrusts Trial Judges with the Task of Identifying Racial Discrimination.

Analysis of Mississippi's waiver rule should be guided by the central role *Batson* and its progeny have assigned to the trial judge. From the doctrine's inception, this Court has had "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination." *Batson*, 476 U.S. at 97; *see also id.* at 99 n.22 (similar). And in virtually every one of its *Batson* cases, the Court has reaffirmed the "peculiar[ ] … province" of the trial judge. *See, e.g.*, *Davis v. Ayala*, 576 U.S. 257, 273-74 (2015); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Rice v. Collins*, 546 U.S. 333, 338-39 (2006); *id.* at 343-44 (Breyer, J., concurring); *Miller-El v. Cockrell*, 537 U.S. 322, 338-41 (2003). This aspect of the doctrine flows from the nature of the claim, the differing strengths of trial and appellate courts, and the high price of retrial, years

later, for an error that could have been corrected on the first day of trial.

1. Very few constitutional claims require the court to probe "the prosecutor's state of mind." *Hernandez*, 500 U.S. at 365. And unlike *Brady* or *Napue* claims, which often seek to prove the prosecutor's knowledge by "inference," *e.g.*, *Glossip v. Oklahoma*, 604 U.S. 226, 248 (2025), the three-step *Batson* procedure forces the prosecutor to "articulate" a "'clear and reasonably specific' explanation'" of his or her *actual motive* for a challenged strike, 476 U.S. at 98 & n.20. This feature distinguishes *Batson* even from other claims of racial discrimination because "direct evidence of intent" (whether lawful or not) should *always* be "available" by conducting step two at trial. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). *Batson* is therefore unique in making one person produce the "best evidence" on the spot and then reducing the "decisive question" to whether that person "should be believed," *Hernandez*, 500 U.S. at 365; *see Flowers*, 588 U.S. at 298 ("The trial judge must determine whether the prosecutor's stated reasons were [his or her] actual reasons[.]"); *Ayala*, 576 U.S. at 271; *Collins*, 546 U.S. at 341 (asking whether "a reasonable factfinder must conclude the prosecutor lied").

Because "the heart" of *Batson* is the prosecutor's "credibility," *Hernandez*, 500 U.S. at 367, it should be resolved at trial. "The reasons are structural. The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere." *Collins*, 546 U.S. at 343 (Breyer, J., concurring); *cf. Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (applying

more deferential standard to credibility findings than even clear error). Only the trial judge has "the benefit of observing the prosecutor firsthand" at the time of the strike, at the time of its explanation, "over the course of the proceedings," *id.* at 336 (majority), and "on a daily basis" in some cases, *Doster v. State*, 72 So. 3d 60, 74 (Ala. Crim. App. 2010). The judge can watch "facial expressions or body language," listen for "hesitation," *State v. Harris*, 289 P.3d 591, 597 & n.10 (Utah 2012), and assess, "in a borderline case," whether any "hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision," *Collins*, 546 U.S. at 343 (Breyer, J., concurring). Appeals courts "cannot on the basis of a cold record easily second-guess" these observations, so they "defer." *Ayala*, 576 U.S. at 274.

The trial judge occupies an even more privileged position when a strike rests on a "fine judgment call," such as "a comparison of [juror] responses that differ in only nuanced respects" or "a sensitive assessment of jurors' demeanor." *Id.* at 273. A prosecutor's reasons will "often invoke a juror's demeanor," and the trial judge is "best situated"—indeed, singularly situated—to confirm that the juror's demeanor matched the prosecutor's description. *Id.* at 273-74. Especially when attorneys strike a juror based on "instinct," *id.*—as they have for centuries, *see* 4 W. Blackstone, Commentaries on the Laws of England *346-47 (1769) (citing "impressions" created by "bare looks and gestures" as valid grounds for a challenge "even without being able to assign a reason for such [ ] dislike")—only the trial judge can come close to seeing what may be "invisible even to the [lawyer]," *Collins*, 546 U.S. at 343 (Breyer, J., concurring).

Accordingly, many of this Court's *Batson* decisions have rested on the defendant's inability to overcome the deference owed to the trial judge's credibility determination. *See, e.g.*, *Ayala*, 578 U.S. at 271-85; *Jackson*, 562 U.S. at 598; *Collins*, 546 U.S. at 339-42; *Hernandez*, 500 U.S. at 369-70; *see also id.* at 372 (O'Connor, J., concurring in judgment). And "once that has been settled, there seems nothing left to review." *Hernandez*, 500 U.S. at 367.

2. But appellate courts "sometimes" elect to hear new *Batson* claims or new arguments and evidence not considered below. Resp. Br. 29. When they do, there are two bad options if they cannot otherwise deny the claim. One is remanding for the trial court to conduct a *Batson* hearing, *e.g.*, *Whatley v. State*, 146 So. 3d 437, 448 (Ala. Crim. App. 2010), or another *Batson* hearing, *e.g.*, *United States v. Joe*, 928 F.2d 99, 103-04 (4th Cir. 1991). A remand respects the trial judge's "better position" having supervised jury selection, *Whatley*, 146 So. 3d at 448, and its ability to bring the striking attorney before it "to judge [his or her] credibility" and "further explore the validity of the various arguments the parties may advance," *Joe*, 928 F.2d at 104. *Accord Johnson v. California*, 545 U.S. 162, 172 (2005) (counseling "against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question").

But a remand adds delay, and "essentially requires reconstructing the entire *voir dire*, something that will be extremely difficult even if undertaken soon after the close of trial." *Cf. Batson*, 476 U.S. at 132-33 (Burger, C.J., dissenting). In many cases, it might be "impossible for the prosecutor … to recall" the reasons

for a strike, *id.* at 133 n.12, let alone the "nuanced" differences among members of the venire, *Ayala*, 576 U.S. at 274. *See Thomas v. State*, 517 So. 2d 1285, 1287-88 (Miss. 1987). A belated hearing can force the court to decide a *Batson* claim based on "nothing beyond 'I do not remember'" from the prosecutor. *Polk v. Dixie Ins. Co.*, 972 F.2d 83, 85 (5th Cir. 1992) (describing *Harrison v. Ryan*, 909 F.2d 84, 87 (3d Cir. 1990)). That courts reach divergent results in such cases, *see id.* at 85-86, is as unsurprising as it is unfortunate, for the "unfair prejudice to the prosecution" is "severe," *McCrory v. Henderson*, 82 F.3d 1243, 1251 (2d Cir. 1996); *cf. Snyder*, 552 U.S. at 472 (no "possibility" of "profitabl[e] … remand at this late date, more than a decade after petitioner's trial").

A second bad option is for an appellate court to conduct its own review of the step-three circumstances now raised together for the first time. It is "difficult[ ]" even to "understand[ ] the nature of [this] review." *Cf. Hernandez*, 500 U.S. at 367. The court must ask whether a trial judge clearly erred in failing to consider facts not brought to the judge's attention. Then it must accord strong deference to the trial judge's credibility finding—again, despite that the finding did not consider the material raised on appeal. Trying to square the circle, an appellate court might imagine what the trial court *would have found* had it been presented with everything argued on appeal. But that counterfactual question, for the "structural" reasons described above, *Collins*, 546 U.S. at 343 (Breyer, J., concurring), is essentially impossible to answer.

The trial judge in *Ayala*, for example, had a "somewhat different" impression from that of the prosecutor

but ultimately agreed that a prospective juror seemed "nervous." 576 U.S. at 285. How can courts possibly weigh new circumstances raised on appeal against that "subjective impression"? *Id.* Or take *Collins*, where the trial judge was willing to give the D.A. "the benefit of the doubt" without having seen a juror "roll[ ] her eyes in response to a question." 546 U.S. at 336-37. It is hard to see how an appellate court, without "observing the prosecutor firsthand," *id.*, could possibly infer "the prosecutor lied," *id.* at 341. It has "no way to know whether the attorneys were credible." *Lisle v. Welborn*, 933 F.3d 705, 715 (7th Cir. 2019).

When a *Batson* claim is not fully ventilated until appeal, the court's task is even more difficult and speculative than usual, for the appeals court isn't even considering "the same factors as the trial judge." *Flowers*, 588 U.S. at 303. In theory, a reviewing court could see new and "extraordinarily powerful circumstantial evidence" that "betray[s] the [prosecutor's] aim," *cf. Alexander v. NAACP*, 602 U.S. 1, 35 (2024), but "in the absence of exceptional circumstances," there can be no "basis" to "second-guess," *Ayala*, 576 U.S. at 274.

In addition to the inherent difficulty in answering counterfactuals about credibility on a cold record, review of *Batson* claims on direct appeal has the downside of forcing an "all-or-nothing" choice. *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (en banc) (Kozinski, J., dissenting). Because the trial court "is no longer in a position to cure the violation during the jury selection process …. [t]he sole remedy remaining is the grant of a new trial, relief that requires an additional and unnecessary expenditure of judicial and litigant resources since a new trial could

have been avoided by a timely decision." *Joe*, 928 F.2d at 103; *accord Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting) ("We do not help the noble cause of peremptory challenges by making every error in this delicate process fatal."). The purpose of *Batson*'s "three-step process" is to "encourage[ ] 'prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.'" *Johnson*, 545 at 172-73. Retrial is both expensive and substantially disruptive.

B. Waiver Rules Properly Channel Claims to the Court Best Situated to Decide Them.

1. By adopting the three-step process and applying a deferential standard of review, *Batson* and its progeny assigned the "pivotal role" to trial courts. *Snyder*, 552 U.S. at 477. In the forty years since *Batson*, state and federal jurisdictions have "formulate[d]" more procedures, *Batson*, 476 U.S. at 99, to facilitate that assignment. Among these are rules that govern the timeliness of a *Batson* challenge. "The appropriateness in general of looking to local rules for the law governing the timeliness of a constitutional claim is, of course, clear. … Undoubtedly, [a State] can adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected." *Ford v. Georgia*, 498 U.S. 411, 423 (1991). If States can deny a *Batson* claim not preserved at trial, it follows that they can also refuse to hear arguments "never mentioned" below. Pet. Br. 41. It's certainly never been "clearly established federal law" that waiver rules like Mississippi's are unconstitutional. *See* Resp. Br. 24-28 (discussing § 2254(d)(1)).

Far from clearly proscribed by *Batson*, waiver rules *vindicate Batson* by directing claims to the decision-maker with the best ability to evaluate them. *Supra* § I.A. If a defendant has a meritorious claim, there's no legitimate reason for him to sandbag the trial court. If the claim is unmeritorious, then courts refusing the tactic of developing it piecemeal on appeal works no prejudice against the defendant; it does, however, spare potentially severe prejudice to the prosecution, *cf. McCrory*, 82 F.3d at 1251.

Petitioner offers a few examples of courts *electing* to allow new step-three arguments on appeal, but he has no serious argument for why they *should*. In a single paragraph, he speculates that defense counsel lack the "opportunity" to raise "granular comparisons" during jury selection. Pet. Br. 45-46. Aside from lacking any support in precedent, this argument proves too much: If *Batson* claims cannot "realistic[ally]" be completed at trial, *id.*, then the trial judge's credibility findings are necessarily incomplete too. Endorsing that proposition would strike at the heart of the deference owed to trial judges. Behind the reluctance to "second-guess" a credibility finding is the assumption that the trial judge is "best situated." 576 U.S. at 273-74. But Petitioner implies almost the opposite—that the trial judge is *never* well situated to evaluate one of the primary "variet[ies] of evidence" in *Batson* cases. *Flowers*, 588 U.S. at 301-02. In effect, the anti-waiver rule would license relitigation of every *Batson* claim on appeal, and it would seemingly justify appellate review without the usual dose of deference. The Court should not create new incentives for defendants to sandbag, which is antithetical to all the structural reasons that *Batson* claims must be resolved at trial.

It would also ill fit the absence of a constitutional right to appeal, *e.g.*, *Davila v. Davis*, 582 U.S. 521, 529 (2017), if the Court held that criminal defendants must be allowed to raise new arguments on appeal. *Cf. Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 329 (1796) (opinion of Elsworth, C.J.) ("[J]ustice is satisfied" by "one opportunity for the trial of all parts of his case.").

2. Petitioner tries to derive an anti-waiver rule from two cases: *Snyder v. Louisiana* and *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*). Pet. Br. 41-44. Neither decision even purported to address "the local power to set procedure." *Ford*, 498 U.S. at 423. *Snyder* focused on the prosecutor's "highly speculative," "suspicious," and ultimately "implausib[le]" and "pretextual" reasons for striking a single prospective juror. 552 U.S. at 482, 483, 485. And if anything, the *Snyder* Court reaffirmed the importance of airing step-three arguments at trial—taking pains to explain that the Court's juror comparison (1) rested on an attribute that had been "thoroughly explored by the trial court," (2) had been addressed by the state high court, and (3) was not "procedurally defaulted." *Id.* at 484 & n.2; *contra* Pet. Br. 42 (suggesting that *Snyder* adopted a constitutional rule that arguments "evident on the face of the record" need not be preserved).

Nor did *Miller-El II* establish a constitutional rule that any and all "*theories* about th[e] evidence" can be withheld until appeal. Pet Br. 43 (quoting 545 U.S. at 241 n.2). Mississippi is exactly right that *Miller-El II* was a § 2254(d)(2) case, so the Court's holding rested on the facts—not on any procedural rule purportedly required by *Batson*. And while the majority rejected the dissent's complaint that some of the facts relied

upon were not "before the Texas courts," it did so by (1) interpreting § 2254(d)(2), not *Batson* or the Constitution; (2) insisting that the key "evidence … on which we base our result[ ] *was* before the state courts"; and (3) sowing doubt "about what was [or was not] before the state courts." 545 U.S. at 241 n.2. To the extent the *Miller-El II* Court reached any legal conclusion—rather than a factual one about what was in the record—it did not adopt a new anti-waiver rule but merely rejected § 2254(d)(2) as a bar to its consideration of certain evidence. That footnote in *Miller-El II* probably does not hold up in light of cases like *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), and *Shinn v. Ramirez*, 596 U.S. 366, 388-89 (2022), but it's neither here nor there for the question presented—whether the Mississippi court was clearly bound by federal law to ignore its waiver rule. Without a case from this Court on all fours with this one, Petitioner cannot succeed under § 2254(d)(1).

C. Reversal Would Disturb the Sensible Waiver Rules of Numerous Jurisdictions.

Mississippi's waiver rule is not a "[n]ovelty." *Ford*, 498 U.S. at 423. It is a bedrock rule of procedure that "an irregularity may be waived." T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 409 (1st ed. 1868). Accordingly, many jurisdictions have applied general waiver principles to *Batson* claims, encouraging defendants to develop claims of purposeful discrimination in the trial court. In some jurisdictions, a *Batson* claim that is not completed at trial is waived; its denial cannot be appealed. In others, failure to rebut the prosecutor's proffered reasons

for a strike precludes raising that rebuttal on appeal. Even in jurisdictions that will consider a *Batson* challenge for the first time on appeal, a defendant's failure to rebut the prosecutor's motives is considered a failure to satisfy the defendant's ultimate burden. Courts have no general duty to scour the record for arguments supporting the defendant's claim. *See* JA728-29 (citing *Ramey v. Lumpkin*, 7 F.4th 271, 280 (5th Cir. 2021); *Chamberlin v. Fisher*, 885 F.3d 832, 838 (5th Cir. 2018) (en banc)).

Amici States do not exalt one approach to waiver in the *Batson* context because this Court has left it to lower state and federal courts to "formulate particular procedures." *Batson*, 476 U.S. at 99; *id.* at 99 & n.24 (declining "to instruct [ ] courts how best to implement" *Batson*). If the Court endorses Petitioner's anti-waiver rule, it will upend the settled rules of many jurisdictions that have relied on *Batson*'s leeway to make the doctrine a workable tool for both trial and appellate courts. For example:

Second Circuit. The Second Circuit requires that federal defendants "expressly indicate" a continuing objection once the government offers reasons for its peremptory challenges. *United States v. Rudas*, 905 F.2d 38, 41 (2nd Cir. 1990); *see also State v. King*, 735 A.2d 267, 281 (Conn. 1999) (citing *Rudas*) (failure to "advance[ ] reasons that are salient to a showing of pretext … may be treated as acquiescence"). The "failure to make any response" at step three—after the government explains its strikes—"indicate[s] to the court that [the defendant] no longer dispute[s]" them. *Rudas*, 905 F.2d at 41. In *Garraway v. Phillips*, for example, the trial court agreed the defendant had

made a prima facie case under *Batson* and required the prosecution to offer race-neutral reasons. 591 F.3d 72, 73 (2nd Cir. 2010). When the prosecution failed to proffer an explanation for one of the strikes, the defendant neither objected nor brought it to the court's attention. *Id.* at 74. "[B]y failing to advise the prosecutor or the court that explanations were offered as to fewer than all of several challenged strikes," the defendant forfeited his *Batson* claim. *Id.* at 76. In order to create a record on which courts can rule, the defendant must continue "to press the objection." *Id.*

Fourth Circuit. In the Fourth Circuit, "once a neutral explanation is presented, the complaining party *must prove* purposeful discrimination." *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1026 (4th Cir. 1998) (emphasis added). The rule stems from the Fourth Circuit's recognition that an appellate court is poorly suited to review *Batson* claims on a cold record. *Joe*, 928 F.2d at 103-04. Accordingly, "the movant's failure to argue pretext constitutes a waiver of his initial objection." *Davis*, 160 F.3d at 1027. A defendant in the Fourth Circuit cannot stand "mute" after opposing counsel asserts race-neutral reasons and then find his voice on appeal. *Id*; *see also United States v. Wiley,* 93 F.4th 619, 629 n.3 (4th Cir. 2024) ("Wiley didn't make this [pretext] argument at trial, which likely means he forfeited it.").

Sixth Circuit. Likewise, the Sixth Circuit applies a burden-shifting framework such that "once the proponent of the peremptory strike proffers a race-neutral explanation, the opposing party has the burden to rebut those reasons for the record." *United States v. McAllister*, 693 F.3d 572 (6th Cir. 2012) (citing *United*

States v. Jackson, 347 F.3d 598, 605 (6th Cir. 2003)). Thus, some step-three argument, or at least a continuing objection, is required to preserve rebuttal arguments on appeal. *Jackson*, 347 F.3d at 605.

Seventh Circuit. The Seventh Circuit stresses that an appellate court can only conduct a meaningful review when the record is complete. *United States v. Lovies*, 16 F.4th 493, 502 (7th Cir. 2021) ("Lovies forfeited these juror-comparison arguments by not presenting them to the district court."). "During jury selection, 'it is the defendant's burden to raise specific arguments that the government's justification for a peremptory strike was pretextual so that the court can properly address them.'" *Id.* (quoting *United States v. Brown*, 809 F.3d 371, 374 (7th Cir. 2016)). The defendant must raise specific challenges in the trial court; otherwise, "the appellate court 'loses the benefit' of the trial judge's firsthand evaluation of [the] jurors." *Lovies*, 16 F.4th at 502 (quoting *United States v. Gooch*, 665 F.3d 1318, 1331 (D.C. Cir. 2012)).

Eighth Circuit. If a defendant fails to renew a *Batson* challenge after the prosecutor offers race-neutral reasons, the Eighth Circuit treats the issue as forfeited and reviews only for plain error. *United States v. Adams*, 996 F.3d 514, 520 (8th Cir. 2021) (citing *Hopson v. Fredericksen*, 961 F.2d 1374, 1378 (8th Cir. 1992)). In *United States v. Scott*, a defendant's "'failure to follow up on his *Batson* objection could have been reasonably construed by the trial judge as an agreement that the expressed reasons were racially neutral.'" 26 F.3d 1458, 1466 (8th Cir. 1994) (quoting *Hopson*, 961 F.2d at 1378).

Alabama. Once the State provides race-neutral reasons for a strike, the burden shifts to the defendant "to make a showing that those reasons were a sham or pretextual." *Knight v. State*, 300 So. 3d 76, 98 (Ala. Crim. App. 2018). If defense counsel "made no such showing" at trial, and "pretext[ ] [is] being raised for the first time on appeal," the record will not support the claim. *Id.* The absence of a trial record cuts against the defendant because he "maintains at all times … the ultimate burden of proving intentional discrimination," *Sharp v. State*, 151 So. 3d 342, 360 (Ala. Crim. App. 2010).[1]

Florida. In Florida, a defendant "cannot simply sit silent—failing to respond to a proffered facially race-neutral reason and failing to object as to why the trial court should not accept that explanation—yet challenge that reason as a pretext for discrimination and the trial court's ruling as insufficient for the first time on appeal." *State v. Johnson*, 295 So. 3d 710, 716 (Fla. 2020). Because a court has no independent duty "to create a record of otherwise unpreserved error," *id.* at 715, the defendant must raise "a reason to doubt the genuineness of the State's proffered race-neutral reasons for a strike, for it is the genuineness of the reason

[1] For many years, Alabama courts entertained new *Batson* claims on appeal in capital cases, but reversed course after judges repeatedly "questioned the propriety" of this practice. *Henderson v. State*, 2024 WL 1946585, at *31 (Ala. Crim. App. May 3, 2024); *see, e.g.*, *Ex parte Floyd*, 190 So. 3d 972, 979, 980, 982 (Ala. 2012) (Murdock, J., concurring in the result) (reasoning, *inter alia*, that *Batson* did not require appellate review of new claims, that an "accurate record" is "crucial on appeal," and that waiver rules "deter[ ] 'sandbagging'").

upon which the trial court must rule." *Gordon v. State*, 350 So. 3d 25, 34 (Fla. 2022).

Kansas. Kansas courts reject a "duty to investigate … sua sponte" factors that may support a *Batson* claim. *State v. Brown*, 498 P.3d 167, 176 (Kan. 2021). The defendant has the burden to create the record needed to prove his claim, which comes with the duty "to draw the [trial] court's attention to any relevant evidence of pretext and purposeful racial discrimination." *Id.* Accordingly, Kansas courts will not credit *Batson* arguments raised on appeal where "no further evidence of purposeful discrimination" was "presented … to the district court." *Id.* at 177.

Missouri. Appellate courts in Missouri will not consider grounds for *Batson* challenges that were not raised in the trial court. *Wright v. State*, 708 S.W.3d 888, 897 (Mo. Ct. App. 2025). The rule covers new step-three arguments purporting to show pretext. *State v. Clark*, 280 S.W.3d 625, 630-31 (Mo. Ct. App. 2008). "A defendant's failure to challenge the State's race-neutral explanation in any way waives any future complaint that the State's reasons were racially motivated, and leaves nothing for this Court to review." *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. 1997).

Utah. *Batson* claims in Utah are subject to a strict time bar and an absolute duty on the party objecting to bring evidence of purposeful discrimination to the trial court. *State v. Harris*, 289 P.3d 591, 595 (Utah 2012). The Utah Supreme Court has recognized that "[i]t is not enough [ ] for a party to raise a *Batson* challenge and expect opposing counsel and the court to complete the heavy lifting." *Id.* Because *Batson* claims should be resolved "while the iron is hot," the

obligation to press the issue is imposed on the moving party and the failure to do so constitutes waiver. *State v. Aziakanou*, 498 P.3d 391, 405 (Utah 2021).

Virginia. In *Buck v. Commonwealth*, a defendant argued pretext for the first time on appeal with new juror comparisons. 443 S.E.2d 414, 415-16 (Va. 1994). The Supreme Court of Virginia held that those arguments were waived because *Batson* assigns "the defense [ ] the burden," and a trial court has no duty "to seek out and evaluate information or evidence not utilized by either party." *Id.* In "the absence of defense counsel's identification of a false or pretextual reason for peremptory strikes," the trial court does not err in denying a claim of purposeful discrimination. *Id.*

* * *

Each of these jurisdictions has adopted some form of a waiver rule like Mississippi's. Each of these regimes would need to be re-evaluated if the Court adopts the position that new step-three arguments can be raised for the first time on appeal.

Even those jurisdictions without strict waiver rules could be affected if *Batson*'s step three becomes a searching inquiry *for the court* in which "all" possible circumstances "must be consulted," Pet. Br. 47. In the Ninth Circuit, for example, a defendant who does not technically *waive* his step-three arguments may still fail to carry his "ultimate burden" if the trial court lacked "information … at the time" of trial." *Boyde v. Brown*, 404 F.3d 1159, 1171 (9th Cir. 2005). Likewise, in the Eleventh Circuit, appellants do not meet their burden at step three in "the absence of any additional argument or evidence." *United States v. Prather*, 279 F. App'x 761, 767 (11th Cir. 2008); *see, e.g.*, *United*

States v. Folk, 754 F.3d 905, 914-15 (11th Cir. 2014); *United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006) (requiring juror comparison to have been "brought to the attention of the court" for further "explanation" from the prosecutor and "a finding by the trial judge"). Several States apply similar rules, focusing on the defendant's burden "to put the court on notice" of his rebuttal or pretext arguments in order to develop the record. *See, e.g.*, *Adair v. State*, 336 S.W.3d 680, 689 & n.6 (Tex. App. 2010); *Johnson v. State*, 68 S.W.3d 644, 649 (Tex. App. 2002). Whether characterized as waiver rules or not, these rules would also be threatened by a suggestion of a constitutional duty to hear new step-three arguments on appeal.

II. If Petitioner Succeeds, the Remedy Would Not Be "Automatic" Release or Retrial.

Petitioner urges that if he's satisfied "subsection (d)(1) or (d)(2)," he must "be released or tried" because *Batson* is an "'automatic reversal precedent[].'" Pet. Br. 50-51. The amicus brief of two academics reaches the same result by a different path, asserting that courts are "required … to discharge prisoners" upon finding a violation of federal law because equity flows "in only one direction: toward mitigation." Scholars Br. 3, 10, No. 24-7351 (Feb. 4, 2026); *id.* at 20 (asserting "obligat[ion] to order the prisoner's release").

Both arguments are foreclosed by precedent, and Mississippi is correct (at 3, 42-43) that if Petitioner succeeds, ordering his release or retrial would not be "appropriate to the violation." *Waller v. Georgia*, 467 U.S. 39, 50 (1984).

A. Petitioner conflates the usual *Batson* remedy on direct appeal with the remedial analysis in habeas. A

habeas petitioner—even one who "overcomes all of th[e] limits" of AEDPA and all of the limits this Court "ha[s] prescribed"—is "never entitled to habeas relief," let alone vacatur of his conviction. *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022). He "must still 'persuade a federal habeas court that law and justice require [the requested relief].'" *Id.* (quoting *Brown v. Davenport*, 596 U.S. 118, 134 (2022)). This burden flows from both the text of 28 U.S.C. § 2243 and "the equitable discretion traditionally invested in federal courts by preexisting habeas statutes." *Davenport*, 596 U.S. at 134.

Insisting that retrial would be "the *only* just and equitable result," Petitioner relies primarily on *Batson* decisions arising on direct appeal. Pet. Br. 51. But "undoing a final state-court judgment" is "different in kind from providing relief on direct appeal." *Davenport*, 596 U.S. at 133. Granting the writ for a state prisoner is an "extraordinary remedy." *Id.* An order on appeal from a conviction obtained in a court of the United States is not. Relief on collateral review is "reserved for only 'extreme malfunctions in the state criminal justice system.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1992)). Reversal on direct review is not.

Eliding these basic distinctions, Petitioner notes "the judicial obligation" to enforce *Batson*. Pet. Br. 52. To be sure, the goal of "eliminat[ing] the taint of racial discrimination" in jury selection is important. *Id.* But all constitutional rights are important, and there is no special class of claims that demand "automatic" relief in habeas. AEDPA itself reflects the judgment that not all constitutional violations must be corrected; only a result so egregiously wrong as to be beyond

fairminded disagreement is open to collateral attack. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). "Faithful application of those standards sometimes puts federal district courts and courts of appeals in the disagreeable position of having to deny relief in cases they would have analyzed differently if they had been in the shoes of the relevant state court." *Klein v. Martin*, No. 25-51, 2026 WL 189976, at *1 (U.S. Jan. 26, 2026) (per curiam); *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) ("[J]udges will sometimes encounter convictions that they believe to be mistaken, but that they must nevertheless uphold."). Consequently, there's nothing novel about "this idea" (Scholars Br. 2) that habeas petitioners, unlike some appellants, must prove more than the existence of a trial error. *See Ramirez*, 596 U.S. at 377; *Davenport,* 596 U.S. at 133-34; *Edwards v. Vannoy*, 593 U.S. 255, 289 (2021) (Gorsuch, J., concurring); *Hurst v. Adams*, No. 4:24-cv-1666, 2025 WL 3718303, at *3-4 & n.1 (E.D. Mo. Dec. 23, 2025).

B. In response to Petitioner's plea for "automatic reversal," Pet. Br. 50-52, Mississippi offers an alternative, Resp. Br. 42-43. *Contra* Scholars Br. 5-6 (asserting the absence of "adversarial presentation" as to the "claimant's entitlement to remedies"). If Petitioner succeeds, the Court may instruct the issuance of a conditional writ "allowing the state supreme court to reassess petitioner's *Batson* claim in light of his rebuttal arguments." Resp. Br. 43-42. Rather than a redo of his trial, the State could afford Petitioner a redo of his appeal. In equity, just because a court "*can* award" certain relief "is not to say that it *should*." *Cf. Trump v. CASA, Inc.,* 606 U.S. 831, 853-54 (2025); *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (noting

"broad discretion in conditioning a judgment granting habeas relief … 'as law and justice require.'").

Mississippi's alternative has much to commend it. First, a new appeal would be complete relief for the alleged violation—that the state *appellate* courts would not hear Petitioner's unpreserved arguments—whereas "a new trial … would be a windfall for the defendant, and not in the public interest." *Waller*, 467 U.S. at 50; *see Jackson v. Denno*, 378 U.S. 368, 394-96 (1964); *Sigler v. Parker*, 396 U.S. 482, 484 (1970) ("permitting a [state] court" "a reasonable time to make an error-free determination"). Indeed, *Batson* itself "remand[ed] … for further proceedings" to apply the proper framework to the defendant's claim. 476 U.S. at 100. Here, if Petitioner's complaint is valid and can be cured by assessing his *Batson* claim without the waiver rule, then a new trial would be greater relief "than necessary." *Cf. CASA*, 606 U.S. at 852 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Only Mississippi's proposal is "limited to … the nature and scope of the constitutional violation." *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Second, a writ conditioned on the State's right to rehear Petitioner's *Batson* claim would respect the State's authority "correct alleged violations of a state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1992). Comity counsels against extending the federal "intrusion on state sovereignty," *Richter*, 562 U.S. at 103, when the state courts are equally "obliged to enforce federal law" and will "provide any necessary relief" flowing from this Court's decree, *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see Hilton*, 481 U.S. at 775 (observing use of conditional

writ "to provide the State an opportunity to correct the constitutional violation"). These "equitable and prudential considerations" have often led the Court "to adjust the scope of the writ." *Danforth v. Minnesot*a, 552 U.S. 264, 278 (2008); *accord Francis v. Henderson*, 425 U.S. 536, 538-42 (1976).

C. Two scholars urge the Court not to decide more than the AEDPA issue, which would mean ignoring pages 18-29 and 50-52 of the opening brief. But if the Court addresses Petitioner's remedial arguments, the professors would have the Court reconsider its precedent on the equitable discretion exercised in habeas. They argue that although equity is "flexible," it must be exercised always "in aid of prisoners" and never in favor of the government. Scholars Br. 8, 12. Equity in early modern England, they write, was "an exercise of mercy." *Id.* at 8-10.

1. Despite casting this Court's "recent opinions" as departures, *id.* at 2, it is the academics who would rework habeas as we know it. *Davenport* and *Ramirez* did not invent "the idea that federal courts possess equitable discretion to deny habeas relief to otherwise eligible prisoners." *Id.* at 2-3. They simply surveyed the path tread by *Danforth v. Minnesota*, 552 U.S. 264 (2008); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977); and *Stone v. Powell*, 428 U.S. 465 (1976)—to name a few. Many of these decisions expressly invoked the history of equity. The doctrines of abuse of the writ and procedural default, for example, were derived from the defense of unclean hands. *See McCleskey*, 499 U.S. at 484-85, 490.

The professors make no attempt to reconcile these longstanding equitable doctrines with their belief that equity flows "in only one direction." Scholars Br. 10. They say that courts lack "discretion to deny habeas relief to otherwise eligible prisoners," but this Court has long recognized the "discretion … to deny relief," *Fay v. Noia*, 372 U.S. 391, 438 (1963), or to "condition[ ]" relief in a way that promotes state interests, *Hilton*, 481 U.S. at 775. The issue in *Davenport*, for example—whether a prisoner must "satisf[y] both this Court's equitable precedents and Congress's statute," 596 U.S. at 145—would have been incoherent if equity could never favor the State; the prisoner could not have an equitable burden at all.

For similar reasons, the argument from legislative history (at 15-22) is defeated by this exception: The scholars admit that the "'law and justice' language of § 2243 and the word 'may' in § 2241(a)" not only *allow* courts to deny habeas relief on equitable grounds but "*require*" that "lower courts" deny relief (if "this Court" has prescribed "narrow rules"). Scholars Br. 22. Courts may apply "harmless error, procedural default, and retroactivity," on this view, but any *other* exercise of equitable discretion is forbidden. *Id.* The brief offers no reason to interpret the statute this way. Its plainly "permissive rather than mandatory language," *Davenport*, 596 U.S. at 128, did not invest courts with exactly and only the discretion to apply a static set of "judicially crafted, narrow rules." Scholars Br. 22.

2. The scholars also fixate on a definition of equity from early modern England. But equity is not reducible to "mercy." "In the most general sense," "Equity … is founded in natural justice." 1 J. Story,

Commentaries on Equity Jurisprudence § 1 (4th ed. 1846). Blackstone defined equity as "synonymous with justice," by which he meant "the true and sound interpretation of the rule." *Id.* § 6; *cf. Petrella v. MGM*, 572 U.S. 663, 688 (2014) (Breyer, J., dissenting) (defining equity, per Aristotle, as the "correction of law"). Thus, equity is not only "mitigation," Scholars Br. 10, but "correcting, mitigating, or interpreting the law" as "reason and justice requireth," 1 J. Story, *supra*, § 8 (quoting C. St. Germain, 1 *The Doctor and Student* (1518), Dialogue 1, ch. 16). The Court's basic point in *Davenport*—that a prisoner bears the burden to persuade a court that "justice require[s]" disturbing his final state conviction, 596 U.S. at 134—is not out of step with any of these historic conceptions of equity. *Contra* Scholars Br. 2.

When this Court has mentioned "mercy" in the context of equity, it has referred to the "qualities of mercy *and practicality* that have made equity the instrument for nice adjustment and reconciliation between *the public interest and private needs*." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (emphasis added). Mercy might be *an* equitable factor in some cases, but that doesn't make the "exercise of equitable power … by definition, an exercise of mercy." Scholars Br. 10. Rather, the "essence" of equity is the "power … to mould each decree to the necessities of the particular case." *Hecht Co.*, 321 U.S. at 329.

It does not follow from the "mercy" argument that courts lack the equitable authority to deny or restrict habeas relief. To the contrary, it would make perfect sense for courts to ask whether a prisoner *deserves* mercy—a question the *amici* do not address. And if in

England, "habeas corpus was to be used *only* 'to the general benefit of the people …,'" Scholars Br. 11 (emphasis added), courts may ask whether issuing the writ would serve the common good—not merely the interests of a particular prisoner. A natural answer to these questions is the practice of some jurists to count the prisoner's guilt against him in the equitable balance. *See, e.g.*, *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2023), *vacated*, 72 F.4th 109 (5th Cir. 2023); *Hurst*, 2025 WL 3718303, at *4-5; *Cody v. Mesmer*, No. 4:20-cv-857, 2023 WL 6214817, at *4-5 (E.D. Mo. Sept. 25, 2023); *Corley v. Blair*, No. 4:22-cv-250-SRC, 2023 WL 4261608, at *5 (E.D. Mo. June 29, 2023); *see also Kaufman v. United States*, 394 U.S. 217, 233-35 (1969) (Black J., dissenting); H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 157 n.81 (1970). If "'to do justice' means 'to shield the innocent and punish the guilty," *Cody*, 2023 WL 6214817, at *5, then the prisoner's guilt bears directly on the equities and the answer to what "law and justice require," 28 U.S.C. § 2243.

CONCLUSION

The Court should affirm.

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