

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TONY TERRELL CLARK, *Petitioner*,

v.

MISSISSIPPI, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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THIS IS A CAPITAL CASE
NO EXECUTION DATE SET

QUESTIONS PRESENTED

At Clark’s capital trial, the State used seven peremptory strikes against Black members of the venire. *Clark v. State*, 343 So. 3d 943, 954 (Miss. 2022). After five such jurors had been struck, Clark’s trial counsel raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court found that the defense made a prima facie showing but ultimately denied Clark’s *Batson* claims. The State proceeded to use three more strikes against Black jurors.¹ A second *Batson* hearing was held, and Clark’s challenge was again denied. The jury was seated with eleven white jurors, one Black juror, and two white alternative jurors.

On direct appeal, the Mississippi Supreme Court refused to consider Clark’s comparative juror analysis and rebuttal arguments, holding that they were waived because they were not presented to the trial court. *See Clark v. State*, 343 So. 3d 943, 954-71 (Miss. 2022). On post-conviction, Clark raised a claim for ineffective assistance of trial counsel for failing to present fully developed *Batson* rebuttal arguments. *Clark v. State*, 418 So. 3d 1226, 1231-32 (Miss. 2025); *cf. Strickland v. Washington*, 466 U.S. 668 (1984). The Mississippi Supreme Court again refused to review Clark’s *Batson* claims. In Mississippi, to prove *Strickland* prejudice, a post-conviction petitioner must meet an impossible standard: proving a successful *Batson* challenge would have changed the outcome of the entire trial.

¹ The State withdrew of one the previous strikes. *Clark*, 343 So. 3d at 954.

The questions presented are:

1. whether a post-conviction petitioner must prove a successful *Batson* challenge would change the outcome of the trial to show *Strickland* prejudice.
2. whether the Mississippi Supreme Court violated due process by holding trial counsel waived Clark's *Batson* rebuttal arguments, rendering him ineffective, but then refused to review Clark's ineffective assistance claim on post-conviction.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Clark v. State, No. 2022-DR-00829-SCT, Mississippi Supreme Court. Judgment entered June 19, 2025. Rehearing denied October 2, 2025.

Clark v. State, No. 2019-DP-00689-SCT, Mississippi Supreme Court. Judgment entered May 12, 2022. Rehearing denied August 11, 2022. This Court denied a petition for writ of certiorari, No. 22-6057 on June 30, 2023. *See* 143 S.Ct. 2406.

PARTIES TO THE PROCEEDINGS BELOW

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tony Terrell Clark, a state capital inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the Supreme Court of the State of Mississippi.

OPINIONS BELOW

The Mississippi Supreme Court's decision denying rehearing on Petitioner's petition for postconviction relief is not reported and is reprinted in the Appendix to the Petition. Pet. App. 1a. The Mississippi Supreme Court's decision granting in part and denying in part Petitioner's petition for postconviction relief is reported at 418 So.3d 1226. Pet. App. 3a-19a. The Mississippi Supreme Court's decision affirming Petitioner's conviction and sentence on direct review is reported at 343 So.3d 943.

JURISDICTION

The Mississippi Supreme Court entered judgment against Petitioner on June 19, 2025. Petitioner timely moved for rehearing which was denied on October 2, 2025. This Court's jurisdiction is involved under 28 U.S.C. §1257(a).

The Mississippi Supreme Court's opinion rested on its flawed interpretation of federal law and contains no independent state law grounds. ("After reviewing counsel's *Batson* challenges and rebuttals, we find counsel's performance did not deprive Clark of the assistance guaranteed by the Sixth Amendment.") Pet. App. 9a. Accordingly, this Court has jurisdiction and review is warranted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. amend. XIV, § 1 provides in relevant part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Sixth Amendment, U.S. Const. amend VI, provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... and to have the Assistance of Counsel for his defence.”

STATEMENT OF THE CASE

A. Legal Background

On April 30, 1986, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986) finding that the discriminatory use of preemptory strikes based on race was unconstitutional. *Batson* also established a three-part test to determine whether a strike is discriminatory. First, the party challenging the strike must make a *prima facie* showing of intentional racial discrimination. *Id.* at 95-96. Second, if the defendant makes out a *prima facie* case, the burden then shifts to the State to give a neutral explanation. *Id.* at 97. After which, in the third and most critical step, the trial court must determine whether the prosecutor’s proffered reasons, even if facially valid, are pretextual. *Id.* at 98. The pivotal question is whether the opponent of the strike has met the burden of showing that proponent has engaged in a pattern of strikes based on race or gender, or in other words ‘the totality of the relevant facts gives rise to an inference of discriminatory purpose.’” *Id.* at 94. “The

trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties.” *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019).

Counsel’s duty to make a *Batson* objection timely is essential. *Batson*, 476 U.S. at 99–100. Thus, failure to do so renders counsel’s assistance defective entitling the defendant to reversal of a conviction or death sentence. *See Drain v. Woods*, 595 Fed. Appx. 558, 583 (6th Cir. 2014)(“The fact that a *Batson* error is structural and requires an adequate remedy lends itself to a conclusion that failure to object... constituted deficient counsel.”)

This Court’s standard for reversal due to deficient performance is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides that the defendant must first show that counsel’s performance was deficient. *Strickland* at 687. This means demonstrating that “counsel made errors so serious that counsel was not functioning as the ‘counsel guaranteed the defendant by the Sixth Amendment.’ ” *Id.* Next, the deficient performance must have prejudiced the defense. *Id.* To determine prejudice, this Court requires that “the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. Essentially, this means that counsel’s errors were so serious as to deprive the defendant of a fair trial — a trial whose result is reliable.

But this Court has been clear that “the concept of prejudice is defined in different ways depending in the context in which it appears.” *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017). Some errors are “deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the

systematic requirements of a fair and open judicial process.” *Id.* at 301. Racial discrimination claims in jury selection are among those. *Id.* at 301. This is because unconstitutional juror strikes create the kind of problem that “def[ies] analysis by harmless error” standards because the “entire trial process” is affected by the error. *Neder v. United States*, 527 U.S. 1,7- 8 (1999).

B. Factual Background

Clark, along with his co-defendant and nephew Teonata Clark, was indicted on November 20, 2014, for the capital murder of M.S., a thirteen-year-old boy who was working with his father at the time of the crime at a convenience store. C.P. Vol. 1, p. 10. The convenience store was owned by the victims, a first-generation immigrant family and located in a low-income urban neighborhood in Canton, Mississippi. Tr. 1615; 1671; 1674. The case was also tried in Madison County, Mississippi, a community with a long and pronounced history of racial violence and discrimination. *See Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1250 (N.D. Miss. 1987)(taking judicial notice of findings that “Mississippi has a long history of de jure and de facto race discrimination,” including racial violence).

The State interjected the cross-racial aspect of the killing into the trial. The prosecutors elicited testimony that the victims were from Yemen and the family came to America in the 1990s. Tr. 1671. In contrast to the hard-working victims who were living the American Dream, Clark was referred to as Frankenstein, a drop out, a drug dealer and chronically unemployed. Tr. 1608-1609; 2028. There was testimony that the victim knew Clark for “years” as a customer at Speedy Mart and Brooklyn Mart, a convenience store off MLK (Martin Luther King Drive). Tr. 1619-20; 1685; 1818. Thus, Clark was a patron at another convenience store located in an urban low-income

predominantly Black area. Clark's race would not have been a secret to the jury, considering he was present for trial.

Racial animus also came into play in jury selection. The State used seven of its twelve peremptory strikes against Black members of the venire, tendering only one Black juror to the defense. *Clark*, 343 So. 3d at 954. The statistical breakdown of the state's systematic elimination of Black jurors in this case has been described as follows:

After initial juror qualification, the jury venire consisted of 165 potential jurors, fifty-seven, or approximately 34.5 percent, of whom were African-American. The State ultimately passed on thirty-eight jurors. Eight of those jurors, or approximately 21 percent, were black. Thirty of those jurors, or approximately 79 percent, were white. The State used all of its twelve peremptory strikes. Seven of those strikes, or 58 percent, were used on black jurors. Five of those strikes, or 42 percent, were used on white jurors. Thus, the State struck 87.5 percent of the black jurors it encountered and only 16.7 percent of the white jurors it encountered. The jury ultimately consisted of eleven white jurors, one black juror, and two white alternate jurors. Thus, black jurors made up 7 percent of the fourteen jurors seated.

Clark v. State, 343 So. 3d 943, 1015 (Miss. 2022) (King, J., dissenting). "In other words, the State was over five times more likely to strike a Black prospective juror than a white one." *Clark v. Mississippi*, 143 S.Ct. 2406, 2408 (2023) (Sotomayor, J., dissenting from denial of cert.). Ultimately, "the State appears to have struck as many Black prospective jurors as it thought it could get away with." *Id.*

Clark's counsel raised a *Batson* challenge and the trial court correctly held that Clark had met his prima facie burden. Tr. Vol. 15, pp. 1569-71, 1584-85, 1593. One of the State's claimed reasons for the strikes was the claim that certain last names belonged to families that were often prosecuted in Madison County. Tr. Vol. 15, pp. 1572-3; 1585-56; 1594. Clark's counsel made no

attempt to rebut the purported race neutral reasons and accepted the prosecutor's conclusory unsupported argument at face value. Tr. Vol. 15, pp. 1577-78; 1586-87; 1594.

Clark's counsel did not obtain the jail and criminal case list documentation of other members of the venire which would have demonstrated the pretext behind the State's use of peremptory strikes. *See* LaBarre Aff. ¶¶8- 9, Ex. AA, attached to Motion for Post-Conviction Relief. The records would have shown that white jurors did not face the same investigation tactics and there was no evidence that the Black jurors were related to people arrested or prosecuted in Madison County, as alleged by the State. *See* Voir Dire Ex. 1 and 2, Bates pp. 2401-02, 2405-11, 2456-66; Madison County Criminal Case Lists by Surname, Ex. EE, attached to Motion for Post-Conviction Relief. Not surprisingly, the trial court accepted the purported race-neutral reasons offered by the state for its peremptory strikes against Black jury members and found no evidence of racial discrimination in the jury selection process. Tr. Vol. 15, pp. 1577-82, 1587-88, 1592, 1595.

Clark was convicted of capital murder and was sentenced to death by lethal injection on the same day. On April 19, 2019, Clark appealed to the Mississippi Supreme Court, alleging a variety of errors, including a claim that the trial court had improperly denied his *Batson* challenges. *See* generally *Clark v. State*, 343 So. 3d 943 (Miss. 2022). Citing *Flowers*, Clark argued that *Batson*'s third step requires the trial court to not simply look back at the reasons for the strike in isolation but to “determine from the totality of the circumstances demonstrated in the entire record whether the State's actions in striking a disproportionate number of blacks from the jury in a particular case was more likely than not ‘motivated in substantial part by discriminatory intent.’ ” *Clark*, 343 So. 3d at 960.

The Court denied relief, affirming Clark’s conviction and sentence of death finding “[t]he case before us is not *Flowers*.” *Clark v. State*, 343 So. 3d 943, 963 (Miss. 2022). In doing so the Court argued that Clark “failed to present a comparative juror analysis or sufficient rebuttal evidence to the trial court, ultimately finding no *Batson* violation.” *Clark v. State*, 418 So. 3d 1226, 1236 (Miss. 2025) (King, P.J. concurring in part and dissenting in part) *citing Clark v. State*, 343 So. 3d 943, 954-971 (Miss. 2022). Clark filed a petition for writ of certiorari with this court, which was denied on June 30, 2023. *Clark v. Mississippi*, 143 S. Ct. 2406 (2023). Three justices dissented. *Id.*

C. Proceedings Below

Thereafter, Clark filed a petition for post-conviction relief, including a claim that Clark received ineffective assistance due to trial counsel’s failure to properly exercise his *Batson* challenge. Clark argued that his trial counsel’s “deficient performance deprived the lower court and [the Mississippi Supreme] Court of fully developed rebuttal arguments to demonstrate pretext for the third, most critical step of the *Batson* analysis.” Motion for Post-Conviction Relief, p. 76. Clark further urged the Mississippi Supreme Court to abandon its requirement that for a petitioner to show *Strickland* prejudice in the *Batson* context they have to prove “that the outcome of the **trial** would have been different.” Motion for Post-Conviction Relief, p. 107.

In an attempt to comply with Mississippi’s impossible standard, post-conviction counsel spoke to struck Black juror Alicia Esco-Johnson. Pet. App. 20a. As common-sense dictates, she could not offer an opinion on whether she would have voted guilty or for a death sentence if she was on the jury. *Id.* She did not believe that reviewing the transcript would let her know what decision to make because she could not judge the credibility of witnesses from a transcript. *Id.* She also confirmed she did not personally know any of persons with the last name of Esco that had been

prosecuted for a felony and would have explained this if she had been asked about it at jury selection. *Id.*

The Mississippi Supreme Court denied relief on this finding Clark did not show “that counsel’s performance before the trial court was deficient” and it did not “deprive[] him of a fair trial with a reliable result.” *Clark v. State*, 418 So. 3d 1226, 1232 (Miss. 2025).¹

REASONS FOR GRANTING THE PETITION

Racial bias in jury selection has long been a troubling aspect of Mississippi’s history.² Recent developments in Mississippi law foreclose meaningful review of *Batson* claims by the state high court. In Mississippi failure to provide rebuttal evidence of the State’s pretextual reasons to the trial court effectively waives *Batson* review on direct appeal. *See Lynch v. State*, 877 So. 2d 1254, 1271 (Miss. 2004). But now there is no remedy for ineffective trial court counsel in post-conviction. In *Powers v. State*, the Mississippi Supreme Court held that to prove *Strickland* prejudice when trial counsel is ineffective by not raising a *Batson* challenge, a petitioner must show “that the outcome of the trial would have been different.” *Powers v. State*, 371 So. 3d 629, 682-90 (Miss. 2023). Thus, petitioners, like Clark are left with no meaningful review of their *Batson* claims where counsel is ineffective. This not only results in a violation of Clark’s constitutional rights but is a stain on our system of justice.

I. **The Mississippi’s Imposition of an Impossible Standard for Establishing Prejudice Conflicts with This Court’s Clearly Established Precedent Warranting Review.**

¹ The Mississippi Supreme Court granted relief in part remanding Clark’s case to the trial court on his *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) claim, but denied his *Batson* claim.

² *See* Carrington, William Tucker and Shirley, Chelsea, THAT WAS NOW, THIS IS THEN: MISSISSIPPI AS A PROXY STATE FOR THE LEGALIZED RE-EMERGENCE OF RACE-BIAS IN CRIMINAL TRIAL JURY SELECTION (October 06, 2025). Available at SSRN: <https://ssrn.com/abstract=5572418> or <http://dx.doi.org/10.2139/ssrn.5572418>, p. 9. (“Race bias in jury selection has deep roots in Mississippi, both jurisprudential and historical.”)

The Mississippi Supreme Court requires petitioners to show that the result of their trial would be different without the State's racially discriminatory strikes to prove ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) in post-conviction proceedings. This is out-of-step with this Court's clear holding that *Batson v. Kentucky*, 476 U.S. 79 (1986) violations are a structural error requiring reversal. *See Rivera v. Illinois*, 556 U.S. 148, 161 (2009). It is nonsensical for courts to engage in forbidden speculation about what jurors would do at trial based on their race, when common sense dictates that Strickland's prejudice requirement that the "result of proceeding would have been different" refers to the *Batson* challenge in this set of facts—not the underlying trial. Because Mississippi law requires courts to speculate whether the race of the jurors would affect the outcome of the trial, this Court should grant review.

Mississippi's impossible standard is out of step with this Court. As shown below, this Court has held that *Batson* is a structural error requiring reversal making Mississippi's tortured prejudice requirements unnecessary. *See Rivera v. Illinois*, 556 U.S. 148, 161 (2009). Further, Mississippi's impossible standard violates *Batson's* premise that a person's race is not relevant to their qualification to serve as a juror. And finally, it is inconsistent with this Court's holding in *Strickland*.

A. Mississippi is out of step with this Court's jurisprudence that a *Batson* violation is a structural error that always results in fundamental unfairness.

In analyzing *Batson* claims, Mississippi has adopted a rule that "[i]f the defendant fails to rebut [the State's race-neutral reasons], the trial judge must base his [or her] decision on the reasons given by the State." *Pitchford v. Cain*, 126 F. 4th 422, 429 (5th Cir. 2025)(internal citations ommited.) *See also Lynch v. State*, 877 So. 2d 1254, 1271 (Miss. 2004)("In the absence of any rebuttal by the defendant, the trial judge is limited to an examination of the reasons given by the State."). Thus, in Mississippi it is incumbent upon trial counsel to adequately rebut the

prosecutor's explanation and failure to do so is grounds for a claim that counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Strickland has two requirements for proving an ineffective counsel claim: deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Here, the critical inquiry before the Mississippi Supreme Court was whether Clark was prejudiced by counsel because it had already held on direct appeal that his counsel was deficient in his *Batson* rebuttal precluding their review. *Clark*, 343 So. 3d at 954-71.

Strickland cautioned that the inquiry into prejudice was not meant to be applied mechanically. *Strickland*, 466 U.S. at 696. Rather, the ultimate inquiry must concentrate on “the fundamental fairness of the proceeding.” See *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017) citing *Strickland*, 466 U.S. at 696. In this vein, racial discrimination is a structural error that results in fundamental unfairness. *Id.* at 301. See also *Rivera v. Illinois*, 556 U.S. 148, 161 (2009)(describing *Batson* as an “automatic reversal precedent[]”); and *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986)(holding that racial discrimination in grand jury selection is structural error.)

Other courts have made the logical conclusion that to satisfy *Strickland* prejudice the “proceeding” is the *Batson* challenge- not the trial itself. See *Doe v. Ayers*, 782 F. 3d 425, 432 (9th Cir. 2015)(prejudice is demonstrated by showing “there is a reasonable probability that the [*Batson*] claim [the petitioner] failed to raise at trial would have prevailed...”); *Drain v. Woods*, 595 F. App'x 558, 583 (6th Cir. 2014)(“ Because a *Batson* violation constitutes a structural error, the failure to object and to remedy the error constitutes error *per se*. Where counsel's ineffective representation lets stand a structural error that infects the entire trial with an unconstitutional taint, there is no question that Petitioner and our system of justice suffered prejudice.”); *Juniper v. Davis*, No. 16-2,

2023 WL: 3050984 at *3 (4th Cir. April 24, 2023)(unpublished opinion)(“We assume, without deciding, that the “proceeding” in question is the deficient or absent *Batson* challenge.”); *Eagle v. Linahan*, 279 F.3d 926, 943 n. 22(11th Cir. 2001)(“ [H]ow can a court, in attempting to give force to the Equal Protection Clause, ask a habeas corpus petitioner to prove, or itself conclude, that the bare factor of juror race, standing alone, affected the outcome of his trial?”)

But not so for Mississippi. The Mississippi Supreme Court’s interpretation of *Batson* prejudice is out of step with this Court’s clear guidance that racial discrimination is a structural error that results in fundamental unfairness. Instead, Mississippi requires a petitioner to show “that the outcome of the trial would have been different” to prove *Strickland* prejudice when trial counsel is ineffective by not pursuing a *Batson* challenge. See *Powers v. State*, 371 So. 3d 629, 682-90 (Miss. 2023).

And Mississippi’s improper application of *Strickland* prejudice to *Batson* claims is on full display here. On direct appeal the Mississippi Supreme Court found that Clark “failed to present a comparative juror analysis or sufficient rebuttal evidence to the trial court, ultimately finding no *Batson* violation.” *Clark v. State*, 418 So. 3d 1226, 1236 (Miss. 2025) (King, P.J. concurring in part and dissenting in part) citing *Clark v. State*, 343 So. 3d 943, 954-971 (Miss. 2022). Then in post-conviction it denied relief on Clark’s *Batson* claim and accepted the State’s argument that to prove *Strickland* prejudice in this context a petitioner must show “that the outcome of the trial would have been different.” State’s Response in Opposition p. 50, citing *Powers v. State*, 371 So. 3d 629, 682-90 (Miss. 2023). The result is a state court that never has to review racial discrimination in jury selection and a violation of Clark’s due process rights.

B. Mississippi's *Strickland* Standard Violates *Batson*'s Premise That a Person's Race is Not Relevant to Their Qualification to Serve as a Juror.

The Mississippi Supreme Court's approach is also flawed as it requires courts to analyze whether a juror will decide a case based on their race. *See* Amy Knight Burns, Note: Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance, 64 *Stan. L. Rev.* 727, 740 (2012) (“*Batson* claims represent an uncomfortable fit with a harmless error regime because requiring proof of a different outcome would entail the court doing exactly what it has forbidden the lawyers to do: making an inference about how jurors would decide a case based on their race.”)

The Constitution prohibits race and gender-based stereotyping as the basis for a peremptory challenge due to the high systemic costs. It is impossible to prove that the racial composition of a jury altered the result of the trial without violating *Batson*'s premise that a person's race is not relevant to their qualification to serve as a juror. It is also inconsistent for courts to forbid prosecutors from speculating about how a member of the venire will decide a case solely based on race as it violates *Batson*, but engage in the same activity it has forbidden in deciding post-conviction claims.

As this Court said, “[e]xclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State’s case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience, or moral integrity to be entrusted with that role.” *Batson v. Kentucky*, 476 U.S. at 104-105 (1986) (Marshall, J. concurring) (internal citations and quotations marks omitted). And more recently, it reminded the lower courts that “[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.” *Flowers v. Mississippi*, 588 U.S. 284, 298

(2019)(internal citations omitted). Indeed, “[n]othing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.” *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, 154 (1994). These considerations demonstrate that *Batson* is not simply about trial prejudice, but fundamental fairness and structural error.

C. The Mississippi Supreme Court’s Outcome Determinative Prejudice Requirement is Out of Step with *Strickland*.

Mississippi’s outcome determinative prejudice requirement also contradicts this Court’s guidance in *Strickland* that “[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker[.]” *Strickland* 466 U.S. at 695.

Indeed, when trial counsel is not ineffective in raising *Batson* challenge(s), the familiar three-step inquiry under *Batson* proceeds. And reversal is required no matter the outcome of the trial. See *J.E.B. v. Alabama el rel. T.B.*, 511 U.S. 127,146 (1994) (reversing judgment); *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (reversing conviction); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (reversing judgment); *Batson*, 476 U.S. at 100. The standard to prove a *Batson* violation cannot be impossibly higher when trial counsel is constitutionally ineffective and thus two constitutional provisions are violated instead of only one.

Batson is thus harmonized with *Strickland* by applying *Strickland*’s prejudice requirement to evaluate the effect of the *Batson* challenge on the outcome of the event to which it properly applies: the jury selection process. Accordingly, the proper test for prejudice is if the *Batson*

objection had been made or effectively pursued, there is a “reasonable probability” it would have been sustained. Determining prejudice through an evaluation of the result of a hypothetical *Batson* objection protects both *Strickland*’s principle of outcome determinative prejudice and *Batson*’s mandate that the jury selection process is not infected by purposeful discrimination.

All in all, the requirements of *Batson* demand that *Strickland*’s prejudice test focus on the jury selection process—not the outcome of the trial.

D. Clark’s *Batson* claims have merit.

Alicia Esco-Johnson, Kathy Lockett, and Fredia Day³ are three Black females who were struck by the State. *Clark*, 343 So. 3d at 954-55. As a basis for its peremptory strikes, the State used jail and criminal case records claiming that the jurors shared the last names of individuals who were prosecuted in Madison County. Tr. Vol. 15, pp. 1572-3; 1585-56; 1594. A review of the jail records produced by the State demonstrates that every single Esco on the list of forty-three persons in the jail database was Black. Voir Dire Ex. 1, Bates pp. 2456-66. Only one Lockett out of some 242 people in the county jail records produced by the state was white. Voir Dire Ex. 2, Bates pp. 2412-55. Also, the name Lockett was the fifteenth most common surname on the Madison County master list used for jury selection at Mr. Clark’s trial. Aff. of Jeffrey Martin ¶44, Ex. DD, attached to Motion for Post-Conviction Relief. Over half of Locketts nationally identify themselves racially as African-American (56.28%) – the highest percentage of any other surname on the master list. Martin Aff. ¶44, Ex. DD, attached to Motion for Post-Conviction Relief. Accordingly, the state

³ Juror Day had two stepdaughters with the last name Lockett. Tr. Vol. 13, p. 1306; Vol. 15, p. 1594

selectively pulled records solely on the names Esco and Lockett for the purpose of eliminating Black jurors.

In fact, the state declined to even investigate any juror last names other than Esco and Lockett to determine whether they shared surnames with arrested or criminally prosecuted persons in Madison County. Nor did the state exercise any peremptory strikes against such other jurors, including Juror #1 Diane Jackson, whose last name appears approximately 159 times in the criminal case lists, or Juror #39 Jack Taylor, with a surname numbering around 118 in the criminal case lists. *See Ex. EE*, attached to Motion for Post-Conviction, pp. 19-30, 59-68. By comparison, the criminal case lists indicate that approximately seventy-five Locketts and only fifteen Escos have been prosecuted in Madison County. *See Voir Dire Ex. 1 and 2*, Bates pp. 2401-02, 2405-11. The state did not investigate the last names of any white jurors in Mr. Clark's case, and it never argued otherwise. *See Brief of Appellee, Tony Terrell Clark v. State of Mississippi*, Miss. Sup. Ct. No. 2019-DP-00689-SCT.

“[D]isparate questioning and investigation of prospective jurors on the basis of race” is indicative of pretext. *Flowers v. Mississippi*, 139 S.Ct. 2228, 2247-48 (2019). By more thoroughly investigating Black jurors, “[p]rosecutors can decline to seek what they do not want to find about white prospective jurors,” and “[a] court confronting that kind of pattern cannot ignore it.” *Id.* at 2248. Here, the state declined to pull the criminal justice system records for white juror last names because it did not want to find that they, too, were potentially related to persons arrested or prosecuted in Madison County.

As stated, obtaining jail and criminal case list documentation of the other members of the venire would have demonstrated this pretext behind the State's use of peremptory strikes in

violation of *Batson*. Clark’s counsel could have used the records to show that the names Esco and Lockett are prominent Black names in Madison County; white jurors did not encounter the same investigation tactics; no evidence supports the state’s suspicion that these jurors were related to people arrested or prosecuted in Madison County; and the state declined to voir dire jurors as to the last name issue. Thus, Clark’s counsel had readily available evidence to unveil the pretext behind the State’s claimed reasons for striking Jurors Esco-Johnson, Lockett and Day, but failed to do so.

Unfortunately, this is not what happened. And now, Clark has an unsurmountable burden to obtain relief. Instead of simply showing that his *Batson* challenge had merit and would have been sustained, Clark is required to show the outcoming of his trial would be different.

II. Mississippi’s Impossible Standard for Ineffective Counsel on Post-Conviction Violates Clark’s Due Process Rights.

The Mississippi Supreme Court recognized on direct appeal that this Court has been critical of its comparative-juror analysis in the past. *See Clark v. State*, 343 So. 3d 943, 960 (Miss. 2022)(“The *Flowers* Court disagreed with this Court’s review of the trial court’s comparative-juror analysis...”). But instead of following this Court’s guidance as set forth in *Flowers v. Mississippi*, 588 U.S. 284, 288 (2019) it has pivoted to bypassing this analysis completely.

Instead, the Mississippi Supreme Court held on Clark’s direct appeal that it could “merely look back at the reason(s) given for the strike in isolation” and was not required to conduct a comparative juror analysis on direct appeal because trial counsel had not requested one. *Clark*, 343 So. 3d at 960-62. Thus, the Mississippi Supreme Court held that Clark’s trial counsel waived his direct appeal *Batson* claims rendering trial counsel ineffective.

Now, on post-conviction, the Court has paired its waiver approach with an impossible standard to show prejudice. So even where, as here, trial counsel was objectively ineffective, a petitioner never is able to obtain meaningful review of his state law claims.

Efforts by post-conviction counsel to obtain “evidence that the trial would be different” show the sham behind Mississippi’s impossible standard. To comply with the Mississippi Supreme Court’s mandate Clark’s post-conviction counsel contacted stricken Black member of the venire Alicia Esco-Johnson. Not surprisingly, she was unable to speculate about whether she would vote guilty or for a death sentence. Pet. App. 20a. Accordingly, Mississippi Supreme Court’s ruling continues the long practice of racial bias in Mississippian jury selection, resulting here in a violation of Clark’s Fourteenth Amendment and Sixth Amendment rights.⁴

The Mississippi Supreme Court has thus “foreclose[d] any remedy via post-conviction relief for the failure to present rebuttal evidence during a *Batson* hearing” in violation of federal law. *Clark v. State*, 418 So. 3d 1226, 1236 (Miss. 2025) (King, P.J. concurring in part and dissenting in part). Mississippi’s post-conviction relief procedures are “fundamentally inadequate to vindicate the substantive rights provided” and violate due process of law. *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). Review is warranted.

CONCLUSION

The petition for certiorari should be granted.

⁴ See generally Carrington, William Tucker and Shirley, Chelsea, THAT WAS NOW, THIS IS THEN: MISSISSIPPI AS A PROXY STATE FOR THE LEGALIZED RE-EMERGENCE OF RACE-BIAS IN CRIMINAL TRIAL JURY SELECTION (October 06, 2025). Available at SSRN: <https://ssrn.com/abstract=5572418> or <http://dx.doi.org/10.2139/ssrn.5572418>

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