

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DESMOND BOOTH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari
to the Florida Fifth District Court of Appeal**

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

Whether defense counsel's decision to object to the removal of a sleeping juror *solely* because that juror was the only black juror on the panel can constitute a reasonable strategic decision under *Strickland v. Washington*, 466 U.S. 668 (1984); and whether *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny – particularly *Georgia v. McCollum*, 505 U.S. 42 (1992) – prohibit defense counsel from making race-based juror retention decisions.

B. PARTIES INVOLVED AND RELATED CASES

1. Parties Involved

The Petitioner is James Desmond Booth, the Petitioner/Appellant below (case no. 5D2024-2807, Florida Fifth District Court of Appeal, whose judgment/opinion is the subject of this petition).

The Respondent is the State of Florida, the Respondent/Appellee below (case no. 5D2024-2807, Florida Fifth District Court of Appeal, whose judgment/opinion is the subject of this petition).

There are no stock ticker symbols for either party.

2. Related Cases

a. *State of Florida v. James Desmond Booth*, case no. 2012-CF-30612, Florida Seventh Judicial Circuit Court, Volusia County. Order Denying Defendant's Motion for Postconviction Relief entered on September 10, 2024.

b. *James Desmond Booth v. State of Florida*, case no. 5D2024-2807, Florida Fifth District Court of Appeal. Opinion entered on February 19, 2026, motion for rehearing denied on March 27, 2026.

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2. TABLE OF CITED AUTHORITIES

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The Petitioner, JAMES DESMOND BOOTH, requests the Court to issue a writ of certiorari to review the judgment of the Florida Fifth District Court of Appeal entered in this case on February 19, 2026 (A-4),¹ rehearing denied on March 27, 2026. (A-3).²

D. CITATION TO OPINION BELOW

Booth v. State, 430 So. 3d 249 (Fla. 5th DCA 2026).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Fifth District Court of Appeal.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” “[T]he right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

The Equal Protection Clause of the Fourteenth Amendment provides that a

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number.

² Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

State shall not “deny to any person within its jurisdiction the equal protection of the laws.”

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

In 2014, the Petitioner was convicted – following a jury trial – of first-degree murder and tampering with a witness. The trial court sentenced the Petitioner to life imprisonment. The Petitioner appealed the judgment and the Florida Fifth District Court of Appeal affirmed the convictions and sentence. *See Booth v. State*, 166 So. 3d 803 (Fla. 5th DCA 2015).

The Petitioner subsequently filed a Florida Rule of Criminal Procedure 3.850 postconviction motion raising several claims of ineffective assistance of counsel – one of which is the subject of the instant petition: defense counsel rendered ineffective assistance of counsel by objecting to the State’s effort to remove a juror who was sleeping during the trial. An evidentiary hearing on this claim was held on July 24, 2023. Following the evidentiary hearing, the postconviction court denied the Petitioner’s claim. On appeal, the Florida Fifth District Court of Appeal affirmed the denial of the Petitioner’s postconviction claim. (A-4).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

The central questions presented involve (1) whether defense counsel's decision to object to the removal of a sleeping juror *solely* because that juror was the only black juror on the panel can constitute a reasonable strategic decision under *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) whether *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny – particularly *Georgia v. McCollum*, 505 U.S. 42 (1992) – prohibit defense counsel from making race-based juror retention decisions. The weight of authority strongly indicates that objecting to a sleeping juror's removal *solely* on racial grounds *cannot* constitute a legitimate or constitutionally protected strategic decision under *Strickland*. In *McCollum*, the Court unequivocally held that the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges, and the Court expressly held that this prohibition does not violate the Sixth Amendment right to effective assistance of counsel. Courts applying *Strickland* have consistently held that race-based jury decisions by defense counsel fall below the objective standard of reasonableness required under the first prong, because such conduct is inconsistent with prevailing professional norms. Whether *Batson* formally extends to mid-trial juror retention decisions (as opposed to peremptory challenges during voir dire) remains an open question that this Court has not directly resolved, but the underlying Equal Protection principles are broad enough to reach such conduct. Moreover, a significant split exists

in this country on whether race-based juror selection by defense counsel constitutes structural error requiring presumed prejudice or whether a defendant must still demonstrate actual prejudice under *Strickland*'s second prong.

1. Factual Background

During the trial, the prosecutor brought to the trial court's attention that a particular juror had fallen asleep during the trial. Specifically, the prosecutor put on the record that the juror was sleeping *during the Petitioner's testimony*:

Yesterday she's had issues of falling – she had some serious issues of falling asleep in trial.

She's been nodding – nodding off throughout the proceeding, but yesterday, *there were several times where she just flat-out fell asleep*.

It got so bad at one point that the presentation of evidence needed to be altered *to accommodate her sleep schedule here in court*.

This was the pinnacle of the trial. *The defendant was on the stand*.

We've had several days of testimony. There were – yesterday was an exciting day. There was yelling in the courtroom. There were things going on. The defendant's on the stand.

And she's sleeping.

(A-30) (emphasis added). The prosecutor stated that “I would just make the motion that she needs to be removed” (A-31), and in making this motion, the prosecutor recognized that the sleeping juror was the only black juror on the jury panel:³

[B]ut this would be a problem independent of her race.

We wouldn't even be talking about it at all if she were not the only black African-American juror on the panel.

Had she been any other race, she'd be gone by now.

(A-32). The trial court confirmed the prosecutor's account that the juror was sleeping.

(A-38) (“[S]he started nodding off.”; “I think she nodded off, just momentarily, would

³ The Petitioner is also black.

wake back up, nodded off again, wake back up.” & “But, yes, she was very tired and was nodding off and having a very hard time staying awake.”). However, despite the clear record of the juror sleeping, when the prosecutor moved to remove the juror, *defense counsel objected*. (A-33) (“Judge, we oppose her removal.”). Notably, defense counsel did *not* dispute that the jury was sleeping. (A-33) (“I’m not saying that anybody’s misrepresenting what has been going on, including [the prosecutor].”). As a result of defense counsel’s objection, the juror remained on the jury and participated in the deliberations leading to the guilty verdict. Obviously from the standpoint of the defense, the most important testimony during this trial was the Petitioner’s – wherein the Petitioner adamantly denied committing the crimes in this case. Yet a juror was sleeping during this critical testimony.

Following his conviction, the Petitioner filed a state court postconviction motion asserting that defense counsel was ineffective for objecting to the State’s effort to remove the sleeping juror. During the evidentiary hearing on this claim, defense counsel was asked why he objected to the State’s request to remove the sleeping juror from the jury, *and he answered that he objected because the juror was black*:

Q. And you objected – I think you objected to the State’s request to remove that juror.

A. Yes.

Q. Why did you make that objection, sir?

A. *Because Mr. Booth and the juror were of the same race.* And, typically, I think that it benefits a defendant, especially one of that ethnicity, to have a person of the same race to be on the jury.

Q. Is that something – something you believed as your career

moved on, that it was in your client's best interest to have somebody, if they could, of the same race on the jury?

A. Yes.

Q. And when you made that objection – or before you made the objection, did you consider the alternatives of whether or not it might be beneficial to remove that juror?

A. Only briefly.

Q. So your instinct, as a trial attorney, was that: It's in my client's best interest for this juror not to be removed?

A. Yes.

(A-20) (emphasis added). On cross-examination, defense counsel agreed that the Petitioner's testimony at trial was "critical" to the theory of defense. (A-23). Defense counsel also acknowledged that it was important that all jurors pay attention to the trial testimony – especially the Petitioner's testimony:

Q. Okay. You would agree Mr. Booth's testimony, though, was critical in the defense case?

A. Absolutely.

Q. Okay. And you would agree with me that a juror sleeping cannot process or speak up when they go back to deliberations, because they're not aware of the testimony if they're sleeping?

A. I agree.

Q. And the alternates in this case, were there any African Americans or other alternates, that you discussed with Mr. Booth, as a potential person to take the place of this African American juror?

A. I do not remember.

Q. Okay. But you would agree with me that regardless of the race of a juror, the most important thing is that the juror is paying attention

the entire time?

A. I agree.

(A-23-24). In its order denying relief on this claim, the postconviction court held that defense counsel's reason for objecting to the removal of the sleeping juror was "strategic." (A-49-50) ("Counsel made a strategic decision when he objected to the State's efforts to remove Juror 40, the only African American juror, for allegedly sleeping during Defendant's testimony.").

2. Argument

a. *The Strickland Framework and Race-Based Juror Strategy*

Strickland established the two-prong test for ineffective assistance of counsel: a defendant must show (1) that counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense, meaning there is a reasonable probability that but for counsel's errors, the result would have been different. Courts apply a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and strategic choices made after thorough investigation are virtually unchallengeable. However, this deference has a critical constitutional limit: it does *not* extend to conduct that is itself constitutionally prohibited.

The intersection of *Strickland* and race-based juror decisions was directly addressed in *State v. Cabrera*, No. CR ID 9904019326, 2015 WL 3878287 (Del. Super. Ct. June 17, 2015), where the Delaware Superior Court held that defense counsel's racially-motivated jury selection strategy – excluding black potential jurors – was

inconsistent with the teachings of *Batson*, *Powers v. Ohio*, 499 U.S. 400 (1991), and *McCullum* and constituted conduct that fell below an objective standard of reasonableness. The court concluded that the Sixth Amendment right to effective counsel does not give a defendant “the right to carry out through counsel an unlawful course of conduct,” and that counsel’s performance fell below an objective standard of reasonableness under *Strickland*’s first prong. *Id.* at *18.

When the race-based decision involves retaining rather than excluding a juror – specifically, objecting to the removal of a sleeping juror *solely* because that juror is the only black juror – the analysis is even more problematic. Courts have consistently recognized that a decision not to object to a sleeping juror can be a legitimate strategic choice. In *Ciaprazi v. Senkowski*, 151 F. App’x 62 (2d Cir. 2005), the Second Circuit held that trial counsel’s decision not to object to a juror who was possibly sleeping during key stages of trial was not ineffective assistance of counsel, because the decision could have been based on the strategy of retaining the inattentive juror rather than seeking replacement with an alternate. Likewise, in *Davis v. State*, 453 S.W.3d 882 (Mo. Ct. App. 2015), the Missouri Court of Appeals held that counsel’s decision not to immediately seek removal of an allegedly sleeping juror was reasonable strategy because it reflected sound judgment about not bringing attention to the allegedly sleeping juror, which would have drawn the jury’s attention away from the evidence being presented. *However, these cases involve race-neutral strategic rationales.* When the *sole* reason for the objection is the juror’s race, the strategic rationale collapses into a constitutionally impermissible basis.

b. *Batson and Its Progeny: Application to Defense Counsel*

In *Batson*, this Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race. The Court subsequently extended *Batson* in three critical directions. In *Powers*, the Court held that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race, establishing that jurors themselves have independent equal protection rights not to be excluded from jury service based on race. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Court extended *Batson* to civil cases. Most significantly for present purposes, in *McCullum*, the Court held that the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

The Court's reasoning in *McCullum* is foundational. The Court held that the harm from discriminatory jury selection is the same regardless of who invokes the discriminatory challenge – in all cases, the juror is subjected to open and public racial discrimination, and the harm extends beyond the individual juror to touch the entire community. The Court grounded its holding in the Equal Protection Clause, finding state action because peremptory challenges are government-authorized and serve a traditional governmental function. Critically, the Court expressly rejected the argument that prohibiting discriminatory peremptory challenges violates the defendant's Sixth Amendment right to effective assistance of counsel, stating that

counsel can ordinarily explain the reasons for peremptory challenges without revealing trial strategy, and that it is “an affront to justice to argue that the right to a fair trial includes the right to discriminate against a group of citizens based upon their race.” *McCollum*, 505 U.S. at 57.

The Court in *McCollum* also drew a distinction that is directly relevant to the sleeping juror scenario: there is a difference between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a challenge to remove an individual juror who harbors racial prejudice. The Court reaffirmed that “[t]his Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror,” and that “the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.” *Id.* at 59.

c. *Whether Batson Extends to Mid-Trial Juror Retention Decisions*

The *Batson* framework was developed in the context of peremptory challenges during voir dire, and neither this Court nor any federal circuit has directly held that *Batson* applies to a defense counsel’s objection to the mid-trial removal of a seated juror based solely on that juror’s race. This is a significant open question for certiorari purposes.

However, the Equal Protection principles underlying *Batson* and *McCollum* are not limited to the peremptory challenge context. *Powers* established that jurors have independent constitutional rights not to be excluded from jury service on the basis of race, and that these rights are grounded in the Equal Protection Clause rather than

in any particular procedural mechanism. In *McCollum*, the Court emphasized that the harm from racial discrimination in jury proceedings is the same regardless of who invokes it and regardless of the specific procedural vehicle. Under this logic, a defense counsel's objection to a juror's removal that is motivated *solely* by the juror's race – rather than by any legitimate concern about the juror's ability to serve – implicates the same Equal Protection interests that *Batson* and *McCollum* were designed to protect.

At the same time, there is a meaningful structural distinction between a peremptory challenge (an affirmative act of exclusion) and an objection to removal (a defensive act of retention). In *State v. Short*, 511 S.E.2d 358 (S.C. 1999), the South Carolina Supreme Court held that there is no *Batson* violation when a juror against whom a party would have exercised a peremptory challenge is ultimately seated, because *Batson* vindicates the juror's right to equal protection, and that right is not abridged if the juror is seated. By analogy, one might argue that retaining a juror – even for racial reasons – does not violate the juror's equal protection rights in the same way that exclusion does. However, this argument is undercut by the fact that the objection in the sleeping juror scenario is *not* neutral: it is an *affirmative* invocation of race as the basis for a legal argument, which is precisely what *McCollum* prohibits.

d. *Sleeping Jurors: Trial Court Discretion and Constitutional Standards*

Courts across multiple federal circuits have established a consistent framework for handling sleeping jurors. If sleep by a juror makes it impossible for that juror to perform duties or would otherwise deny the defendant a fair trial, the sleeping juror

should be removed; however, a court is not invariably required to remove sleeping jurors, and a court has considerable discretion in deciding how to handle the situation. *See, e.g., United States v. Freitag*, 230 F.3d 1019 (7th Cir. 2000). Reversal is appropriate only if the defendant was deprived of Fifth Amendment due process rights or the Sixth Amendment right to an impartial jury. *See id.* at 1023. Courts review sleeping juror decisions for abuse of discretion.

Under Federal Rule of Criminal Procedure 24(c), a court may impanel alternate jurors to replace jurors who are unable to perform or who are disqualified from performing their duties. The rule limits the trial court's discretion by specifying acceptable reasons for removal – incapacity and disqualification – and courts have held that this rule protects the defendant's valued right to have the trial completed by a particular tribunal. *See Hinton v. United States*, 979 A.2d 663 (D.C. 2009). In *State v. Brown*, 397 So. 3d 321 (La. 2024), the Louisiana Supreme Court affirmed the removal of a juror who appeared to be sleeping through a substantial and significant portion of trial. In *Richardson v. State*, 908 S.E.2d 234 (Ga. Ct. App. 2024), the Georgia Court of Appeals held that courts will not interfere with a trial court's decision regarding removal of a sleeping juror absent an abuse of discretion, and further held that defense counsel's failure to request further action from the trial court regarding an alleged sleeping juror did not amount to ineffective assistance of counsel.

The constitutional standard for sleeping jurors requires showing specific evidence of prejudice. A sleeping juror may prejudice the defendant's due process rights and right to an impartial jury, but the defendant must demonstrate specific

evidence of prejudice, such as how long jurors slept or what specific testimony they missed. Importantly, the constitutional concern runs in favor of the defendant, not in favor of retaining a sleeping juror. A juror who is asleep is not performing the function of an impartial juror, and the defendant's constitutional right to an impartial jury is not served by retaining a juror who cannot hear the evidence.

e. *Structural Error and the Prejudice Question*

A significant split exists on whether race-based juror selection by defense counsel constitutes structural error requiring automatic reversal or presumed prejudice, or whether a defendant must demonstrate actual prejudice under *Strickland's* second prong.

The Seventh Circuit, in *Winston v. Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011), held that intentional discrimination on the basis of race in jury selection is a structural error – a defect in the constitution of the trial mechanism that defies analysis by harmless-error standards because the entire conduct of the trial from beginning to end is affected. The court concluded that prejudice is automatically present when the selection of a petit jury has been infected with a violation of *Batson* or *J.E.B. v. Alabama*, 511 U.S. 127 (1994), translating the structural error doctrine into *Strickland* terms by reasoning that structural errors inevitably undermine confidence in the outcome. *See id.* The Eighth Circuit reached a similar conclusion in *Ford v. Norris*, 67 F.3d 162, 170-171 (8th Cir. 1995), holding that a constitutional violation involving the selection of jurors in a racially discriminatory manner is a

structural defect in the trial mechanism that cannot be subjected to harmless error analysis, and that the constitutional error requires automatic reversal.

In contrast, the Delaware Superior Court in *Cabrera* declined to presume prejudice, holding that even though defense counsel's racially-motivated jury selection strategy constituted deficient performance under *Strickland's* first prong, the defendant was required to demonstrate actual prejudice – that but for the race-based strategy, the result of the proceeding would have been different. *See Cabrera*, 2015 WL 3878287 at *19. The court acknowledged the broader harm to the public and the integrity of the criminal justice system but found that the defendant had not demonstrated that he personally suffered prejudice, particularly because he received the jury his lawyers believed would be most sympathetic to him. *See id.* at *20. The Tennessee Court of Criminal Appeals in *Cox v. State*, 880 S.W.2d 713, 719 (Tenn. Crim. App. 1994), similarly held that defense counsel's race-based jury selection did not constitute ineffective assistance of counsel because the defendant failed to show prejudice under *Strickland*, even assuming a *McCollum* violation could be established.

This Court has not definitively resolved this split. In *Weaver v. Massachusetts*, 582 U.S. 286 (2017), the Court addressed structural error in the context of a closed courtroom and noted that when structural errors are raised in an ineffective-assistance-of-counsel claim on collateral review, the result may differ from when they are raised on direct appeal, but the Court expressly *declined* to address whether the result should be different for race or gender discrimination in jury

selection raised through an ineffective-assistance claim:

This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, though the Court has yet to label those errors structural in express terms. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. *And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.*

Weaver, 582 U.S. at 301-302 (emphasis added) (citations omitted). Hence, the question of whether *Batson* violations by defense counsel require presumed prejudice or actual prejudice under *Strickland* remains unresolved. The instant case is the appropriate case for the Court to address this question and resolve the split of authorities cited above.

* * * * *

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to address the significant – and unresolved – questions that are raised in this case. The questions in this case have the potential to impact numerous criminal cases nationwide. The Petitioner therefore urges the Court to exercise its discretion to hear these important questions.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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