

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TERRY PITCHFORD,)
)
) Petitioner,)
)
) v.) No. 24-7351
)
BURL CAIN, COMMISSIONER,)
)
MISSISSIPPI DEPARTMENT OF)
)
CORRECTIONS, ET AL.,)
)
) Respondents.)
- - - - -

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1 APPEARANCES:
2 JOSEPH J. PERKOVICH, ESQUIRE, New York, New York;
3 appointed by the Court, on behalf of the
4 Petitioner.
5 SCOTT G. STEWART, Solicitor General, Jackson,
6 Mississippi; on behalf of the Respondents.
7 EMILY M. FERGUSON, Assistant to the Solicitor General,
8 Department of Justice, Washington, D.C.; for the
9 United States, as amicus curiae, supporting the
10 Respondents.
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P R O C E E D I N G S

(10:27 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-7351, Pitchford versus Cain.

Mr. Perkovich.

ORAL ARGUMENT OF JOSEPH J. PERKOVICH
ON BEHALF OF THE PETITIONER

MR. PERKOVICH: Mr. Chief Justice, may it please the Court:

In the selection of Terry Pitchford's capital jury in 2006, the trial court grasped and conducted just two of Batson's three steps after the district attorney struck in succession four black citizens. Despite the state's assertions throughout the red brief, the judge never determined the credibility of the prosecutor's step 2 proffers. Had the judge done what Batson demands in step 3, the court would have considered, from the voir dire that single February morning, the prosecutor's absence of questioning about the issues and the proffers' lack of record support and irrelevance to the case.

What is more, proper credibility

1 determinations would have concerned numerous
2 extreme bad-faith findings against this
3 district attorney in two Mississippi Supreme
4 Court capital reversals published in 2003 and
5 2000, which held this prosecutor had fabricated
6 prior statements to impeach four witnesses who
7 were black and, in closing argument, espoused
8 14 discrete lies about the record.

9 Instead of abiding Batson, Pitchford's
10 trial court careened to opening arguments.
11 When the defense strained to be heard from --
12 before the jury's empanelment both about Batson
13 and a fair cross-section challenge, the judge
14 assured her three times the Batson objections
15 were preserved.

16 Yet the Mississippi Supreme Court
17 found that Pitchford's defense failed to rebut
18 the proffers and thus waived argument, while
19 deeming the merely race-neutral proffers as
20 "acceptable," a pale substitute for Batson's
21 demands and a sidestep of the trial court's
22 failure to determine the credibility of the
23 four strikes.

24 The trial court's own rectified
25 failings in this prosecution, also riddled with

1 other misconduct, yielded a jury selected with
2 discriminatory taint, which in turn condemned
3 an 18-year-old whose accomplice, according to
4 the state's case, killed the shopkeeper in this
5 botched robbery.

6 We urge this Court to reinforce the
7 Equal Protection Clause's guarantees for
8 defendants as well as citizens willing to
9 accept the awesome responsibility of jury
10 service.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Did trial counsel
13 make those arguments?

14 MR. PERKOVICH: Mr. -- Justice Thomas,
15 which arguments specifically do you mean?

16 JUSTICE THOMAS: Did -- did the trial
17 counsel make the argument that the prosecution
18 discriminatorily picked the -- the jury or
19 exercised peremptory strikes --

20 MR. PERKOVICH: Trial counsel --

21 JUSTICE THOMAS: -- for the reasons
22 you just stated?

23 MR. PERKOVICH: Justice Thomas, trial
24 counsel made the objection timely and --

25 JUSTICE THOMAS: What was the

1 objection?

2 MR. PERKOVICH: It was a Batson
3 objection.

4 JUSTICE THOMAS: Okay. And did --
5 did -- trial counsel has the burden of
6 demonstrating discrimination, right?

7 MR. PERKOVICH: Justice Thomas, that's
8 correct.

9 JUSTICE THOMAS: So did trial counsel
10 do that?

11 MR. PERKOVICH: Justice Thomas, trial
12 counsel attempted to engage that process, which
13 entails three steps and burden-shifting.
14 Unfortunately, the third step did not occur in
15 this case, notwithstanding trial counsel's
16 effort.

17 JUSTICE THOMAS: What do you mean by
18 that, it didn't occur? The judge decided that
19 it was race-neutral.

20 MR. PERKOVICH: Respectfully, Justice
21 Thomas, yes, that's all the judge did.

22 JUSTICE THOMAS: But did the trial
23 counsel offer an argument or evidence that the
24 reasons offered by the prosecutor were
25 pretextual?

1 MR. PERKOVICH: Justice Thomas, as
2 the -- the venire was being released from the
3 court, trial counsel sought to be heard on
4 Batson and a fair cross-section issue and --
5 and was told by the trial judge repeatedly that
6 her record was preserved.

7 JUSTICE THOMAS: But didn't trial
8 counsel subsequently file an affidavit
9 indicating that she did not raise these
10 objections?

11 MR. PERKOVICH: Justice Thomas, yes,
12 that's correct. Three years after the decision
13 that's before the Court now in state
14 post-conviction, an affidavit supporting a
15 post- -- an ineffective assistance of
16 post-conviction counsel -- or convict -- trial
17 counsel was authored which hews very closely to
18 the decisions before the Court. It just
19 mirrors what was ruled by the state supreme
20 court in 2010.

21 CHIEF JUSTICE ROBERTS: What the
22 transcript -- transcript shows is that
23 Ms. Steiner's -- what she said is: At some
24 point, the defense is going to want to reserve
25 both its Batson objection and straight

1 Fourteenth Amendment racial discrimination.

2 Was that objection raised later on? I
3 mean, I think -- I think that's where -- that's
4 the preface to where you say three times the
5 court said you -- you have that. And I wonder
6 if there was some confusion between the -- the
7 reference to "At some point, the defense is
8 going to want to reserve" and the court's
9 statements that it is -- "you've already made
10 it in the record, so I am of the opinion that
11 it is in the record."

12 MR. PERKOVICH: Mr. Chief Justice,
13 thank you for that question. It allows me to
14 clarify the sort of -- the goalposts on this
15 question under Mississippi procedure.

16 When the venire is dismissed and --
17 and the jury's empaneled, the opportunity to
18 challenge Batson essentially ends or does end.
19 Of course, there are, you know, posttrial
20 motion practice that can occur. So the
21 relevant time for this to be addressed, which
22 defense counsel was aware of, and that's why
23 she strived to speak to that issue in a
24 separate fair cross-section issue, when it was
25 still relevant for the trial court's decision,

1 so I don't -- I don't think that the -- the
2 defense counsel was seeking to sort of put a
3 marker to be able to return to it because
4 there's really -- that was the point of no
5 return for -- for the judge.

6 CHIEF JUSTICE ROBERTS: Well, but she
7 did say, at some point, she's going to want to
8 reserve. I just wonder if that's a source of
9 some confusion for the judge or what we're
10 supposed to do with that potential.

11 MR. PERKOVICH: Well, Mr. Chief
12 Justice, I think, if you see sort of as the
13 colloquy goes down the page with, as you
14 pointed to, it's clear in the record three
15 times; then the judge turns to reiterating his
16 ruling, which, again, is merely a step 2 ruling
17 as to race-neutral findings, and he says so
18 there is no Batson violation, drawing a line
19 under the Batson colloquy at that point and
20 then shifting to the other issues, meaning that
21 fair cross-section challenge I spoke of.

22 JUSTICE JACKSON: Could we interpret
23 "at some" -- "at some point" from the defense
24 counsel as an indication that she was preparing
25 or prepared to make the showing and she was

1 asking the court for the opportunity to do so?

2 MR. PERKOVICH: Justice Jackson, yes,
3 I think that that is the fair reading and an
4 unmistakable reading of this record.

5 JUSTICE JACKSON: I mean, it does --
6 it does indicate that she was suggesting that
7 she would like to do something. It wasn't as
8 though she felt as though the Batson objection
9 was already -- or at least her arguments were
10 perfected, and it sounds to me from the
11 transcript that the trial court was cutting her
12 off, was not giving her a chance --

13 MR. PERKOVICH: Yes, Justice --

14 JUSTICE JACKSON: -- was maybe
15 mistakenly saying that it had already been
16 done.

17 MR. PERKOVICH: Yes, Justice Jackson.
18 If I could pick up on that last point. I -- I
19 think the cold record here, and it is a cold
20 record we're working with, of course, indicates
21 that if you look at page 168 in the JA in terms
22 of that initial colloquy when the Batson
23 challenge was raised and then Miller-El was
24 invoked, the judge is -- is sort of reflecting
25 a disorientation to what the Batson inquiry

1 holds, which is three steps.

2 He is speaking to the race-neutral
3 proffers that, you know, correctly are the
4 second step, but he's unclear whether this goes
5 to all the stricken venire members or just the
6 black stricken venire members on 168.

7 And so you fast-forward to the
8 proffers that are put forward by the prosecutor
9 and you see in rapid fire within a page the
10 finding race-neutral, race-neutral,
11 race-neutral, race-neutral, let's return to
12 striking the jury, and -- and the court
13 instructs the defense to continue the
14 peremptory strikes.

15 And so, at the first moment where
16 there is an opportunity to speak to this,
17 defense counsel returns to the issue and seeks
18 to be heard on it and, as noted, is told three
19 times in a row it's clear in the record and
20 then a reiteration of the ruling.

21 JUSTICE KAVANAUGH: Well, after the --

22 JUSTICE BARRETT: But, I guess --

23 JUSTICE KAVANAUGH: -- after the --
24 the point the Chief Justice raised, at some
25 point, the -- the court responded you've

1 already made it in the record, so I'm of the
2 opinion it is in the record.

3 And then the prosecutor -- I mean the
4 defense counsel says, well, I don't want to let
5 the paneling go by without having those
6 objections.

7 And then the court says I think you've
8 already made those and they are clear in the
9 record. For the reasons previously stated, the
10 court finds the reasons were race-neutral,
11 right?

12 So it -- it continues on. I guess how
13 we read that confusion is -- is critical to
14 whether there's a waiver here or whether it was
15 unreasonable to find a waiver here.

16 MR. PERKOVICH: That's right, Justice
17 Kavanaugh. And, of course, you know, that
18 addresses the D2 considerations in the case,
19 and there are legal implications as well in
20 terms of the mishandling of this, but reading
21 that record and determining whether this is a
22 reasonable determination that this defense
23 counsel on this transcript had forfeited or --
24 or failed to rebut when her effort to be heard
25 on the matter was clearly addressed and -- and

1 so her --

2 JUSTICE SOTOMAYOR: Counsel --

3 MR. PERKOVICH: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: -- in the
5 posttrial motion that was made here, the jury
6 was empaneled right after the exchange the
7 Chief made, so there was --

8 MR. PERKOVICH: Yes.

9 JUSTICE SOTOMAYOR: -- no time to make
10 a record there.

11 MR. PERKOVICH: Yes.

12 JUSTICE SOTOMAYOR: In the posttrial
13 motion that was made by plaintiff's -- by
14 Petitioner's counsel, I believe she did raise a
15 Batson challenge and she did raise the pretext
16 argument directly, didn't she?

17 MR. PERKOVICH: Justice Sotomayor,
18 that's right. And that's very salient because
19 that is on this record the first opportunity
20 meaningfully to speak to the pretext question
21 in comparison to issue which he did --

22 JUSTICE SOTOMAYOR: Once the -- once
23 the judge decided to empanel the jury, the only
24 time really to raise it again was on posttrial
25 motions?

1 MR. PERKOVICH: That's correct, Your
2 Honor.

3 JUSTICE SOTOMAYOR: And she did. She
4 said the reasons were pretext given -- I -- I
5 don't have the exact language or maybe you have
6 it memorized -- but given the -- the same --
7 the voir dire was similar, they gave answers
8 similar to the general public to the other
9 people in the pool, correct?

10 MR. PERKOVICH: Yes, Justice
11 Sotomayor. And that's drawing from
12 questionnaire responses because there was no
13 voir dire to speak of of the stricken
14 individuals here.

15 JUSTICE BARRETT: Counsel, can I ask
16 you how you think that the voir dire or the
17 interchange, sorry, between counsel and the
18 district -- and the judge should have gone?

19 One thing I find challenging in
20 reading the transcript, it doesn't record
21 pauses, right, it doesn't record seconds, and
22 so, if we had a transcript here where the --
23 the judge said, sit down, counsel, I don't want
24 to hear anything more from you --

25 MR. PERKOVICH: Right.

1 JUSTICE BARRETT: -- that would be a
2 lot clearer, right? I mean, but we're in D2,
3 so, you know, the state's getting a lot of
4 deference here.

5 What do you think the judge should
6 have done?

7 MR. PERKOVICH: Justice Barrett, what
8 we see commonplace in our courts is the court
9 turning to the defense and offering the floor
10 in some fashion. Agreed, we don't have sort of
11 an audio recording. We can't sense whether
12 there's a pause here, but I think the context
13 is really important.

14 And this is a jury selection process
15 with a voir dire that took about three hours.
16 To put it in context, the Miller-El case,
17 obviously, it's really important here --

18 JUSTICE BARRETT: But I -- but -- but
19 you're not really answering my question. When
20 she raised the objection, when she said she
21 wanted to preserve it for the record, all she
22 had done at this point -- I mean, you're right,
23 there are three steps, but the -- so she raised
24 the Batson objection. The prosecutor advanced
25 the race-neutral reason. And she had the

1 opportunity to impeach that reason essentially.

2 Right?

3 MR. PERKOVICH: Respectfully, no, Your
4 Honor.

5 JUSTICE BARRETT: Well, so -- well,
6 let's see. That would be the third step. What
7 you're saying is that the judge cut her off
8 before she reached that step, correct?

9 MR. PERKOVICH: Yes, Your Honor.

10 JUSTICE BARRETT: I mean, I -- I
11 understood the fair cross-section point to be
12 part of her effort to impeach, not just a
13 distinct argument. Am I understanding that
14 wrong?

15 MR. PERKOVICH: Justice Barrett, I'll
16 point you to JA 161 through 163, where there is
17 a submission of the fair cross-section
18 argument.

19 JUSTICE BARRETT: So she wasn't making
20 that point also in reference to the Batson
21 challenge?

22 MR. PERKOVICH: There's some overlap
23 because of --

24 JUSTICE BARRETT: Some overlap?

25 MR. PERKOVICH: -- of the general

1 issue with the jury, but it's a discrete
2 challenge.

3 JUSTICE BARRETT: Discrete challenge.

4 MR. PERKOVICH: And that shows up in
5 the appellee's brief and the -- and the
6 ultimate decision in the case as well.

7 JUSTICE BARRETT: Okay. So I guess
8 here's -- here's my specific question. If you
9 could tell me what you think the judge should
10 have done, because she raises the objection.
11 The prosecutor offers a race-neutral reason.

12 MR. PERKOVICH: Right.

13 JUSTICE BARRETT: She does raise -- I
14 mean, she speaks up, so she's able to make this
15 cross-section point, which goes to, you say,
16 there's some overlap.

17 Should the judge there have paused
18 to -- I mean, so is -- is the idea here that
19 the judge should have paused and said do you
20 have anything further to say to show that this
21 was pretextual?

22 MR. PERKOVICH: Justice Barrett,
23 there's sort of two junctures here within five,
24 six pages of the JA that are important. The
25 first are, after the race-neutral

1 determinations are made, the court then
2 immediately instructs the -- the defense to
3 start striking the jury with the panel that's
4 in the box.

5 So, after that's done and before the
6 venire is dismissed or as the venire is
7 dismissed, the defense attorney returns to the
8 issue and -- and seeks --

9 JUSTICE BARRETT: But did the defense
10 attorney have an obligation to speak up even at
11 that other point and at the first point you're
12 describing and say this is why -- I mean,
13 usually we expect lawyers to assert their --
14 their points, to assert their objections. So
15 I'm just wondering, does the judge have an
16 obligation to stop and elicit a response, or is
17 it the defense counsel's burden to, because
18 the -- the defendant bears the burden of
19 proving the Batson challenge, right?

20 MR. PERKOVICH: Yes, Justice Barrett.
21 In a situation where you have four strikes that
22 are being addressed in succession and the court
23 elects to deal with the step 2 all in a row, it
24 would be reasonable and certainly kind of the
25 only way to -- to encounter what's transpiring

1 in that back-and-forth between the prosecutor
2 and the judge to expect that step 3 will occur
3 after that.

4 JUSTICE BARRETT: But did defense
5 counsel have an obligation to raise the point?

6 MR. PERKOVICH: The court has an
7 obligation to conduct step 3 in the first
8 place. The burden of persuasion remains with
9 the defense counsel throughout all this, but it
10 also coexists with a parallel duty that the
11 trial court has to make its determination and
12 critically --

13 JUSTICE BARRETT: So are you -- are
14 you returning to the argument which was
15 addressed -- the Fifth Circuit got to this
16 point that you're saying that the trial court
17 made no determination about whether there was a
18 Batson finding?

19 MR. PERKOVICH: Yes, Justice Barrett.
20 That -- that's --

21 JUSTICE BARRETT: So you're --

22 MR. PERKOVICH: -- what this record
23 reflects, yeah.

24 JUSTICE SOTOMAYOR: Counsel, I -- I
25 think --

1 JUSTICE ALITO: Mr. Perkovich --

2 JUSTICE SOTOMAYOR: -- I think, if you
3 look at Purkett, Hernandez, and Snyder --

4 MR. PERKOVICH: Yes.

5 JUSTICE SOTOMAYOR: -- they answer
6 Justice Barrett's question in that the
7 obligation is on the trial judge to make a
8 finding on step 3, correct?

9 MR. PERKOVICH: Yes.

10 JUSTICE SOTOMAYOR: And --

11 JUSTICE BARRETT: To clarify, though,
12 I -- I agree with that. I was just talking
13 about the argument about the --

14 JUSTICE SOTOMAYOR: Yes -- no, no, no.
15 I -- my follow-up to that was I think that what
16 you're saying, given the transcript, is I think
17 the judge believed he only had to find a
18 race-neutral reason because he says that at the
19 very beginning of this process.

20 He says: All I have -- at times, a
21 lot of times on Batson, I just have the state
22 give race-neutral -- I'm assuming he meant
23 race-neutral reasons -- as to all.

24 MR. PERKOVICH: Right.

25 JUSTICE SOTOMAYOR: And she says: I

1 think the jurisprudence simply states the court
2 must make a determination on the basis of all
3 the relevant circumstances to racial
4 discrimination. The judge then says: I'll
5 have the state give race-neutral reasons.

6 And after each race-neutral reason is
7 given, he then asks for the next one and the
8 next one and the next one. And I think your
9 point is he never pauses to give her a chance
10 to address pretext, correct?

11 MR. PERKOVICH: Right, Justice
12 Sotomayor. This --

13 JUSTICE SOTOMAYOR: Or for him to make
14 the required third step finding.

15 MR. PERKOVICH: This is a -- this is
16 an exchange between the prosecutor and the
17 trial court for all four of the step 2 steps.

18 JUSTICE ALITO: Mr. Perkovich, what
19 happened here is certainly not a model to be
20 followed in future cases, but I wonder if you
21 would agree that in interpreting this
22 transcript, we can take into account the way
23 defense counsel generally behave in a situation
24 like this.

25 MR. PERKOVICH: Justice Alito, when --

1 if you could clarify that question of -- of
2 defense counsel's general behavior.

3 JUSTICE ALITO: Well, this is the most
4 timid and reticent defense counsel that I have
5 encountered. Any competent defense attorney
6 that I knew would have spoken up.

7 Let's take this -- you know, take this
8 example. This is on 169, Juror Number 30, the
9 prosecutor is called upon to give his
10 race-neutral reasons. He says: She has mental
11 problems according to a police captain, they've
12 had numerous calls to her house, and said she
13 obviously has mental problems.

14 And then the -- the court says that
15 would be race -- that would be race-neutral as
16 to that juror. And nothing is said. I mean,
17 any -- with respect to all of these jurors, all
18 the defense counsel I have known would be
19 standing up and say, Your Honor, that's a
20 pretext and so forth and so on to make clear
21 that -- that the point is driven across to
22 the -- to the trial judge. I don't understand
23 what happened here, unless -- I mean, unless --
24 well, anyway, I don't understand it.

25 MR. PERKOVICH: Well, Justice Alito, I

1 think the fact that this is sort of a
2 two-person conversation very clearly from the
3 record and that these strikes were clustered
4 reflected what was going on in that courtroom
5 with the judge just addressing the steps in
6 succession. I think the reasonable expectation
7 is that defense was going to be heard, and
8 that -- and that third step just did not
9 happen. Rather, the court instructed her to
10 strike her panel. And she returned to this
11 once -- once there was that opportunity that
12 we've already discussed.

13 JUSTICE ALITO: Yeah, but I know, you
14 know, trial -- trial lawyers have to have a
15 certain amount of toughness. And she had every
16 opportunity. Now the judge didn't handle this
17 the way it should have been handled.

18 MR. PERKOVICH: Yes.

19 JUSTICE ALITO: The judge should have
20 said, okay, that's -- that's your reason;
21 defense counsel, what -- what do you have to
22 say, if anything? You know, that's what should
23 have been done. But, really, she had every
24 opportunity to make her point and she didn't.
25 It's not -- it's not a case where the judge

1 said shut up, sit down, I'm going to hold you
2 in contempt if you say anything more.

3 MR. PERKOVICH: Justice Alito, it
4 didn't get to -- to that kind of pitch,
5 certainly. However, the way this rushed
6 process occurred throughout the whole morning,
7 culminating in the strikes, as I was starting
8 to answer Justice Barrett, in context, in
9 Miller-El, voir dire took five weeks with a
10 venire that was 108 people as opposed to 96.
11 So the rushed nature of this, I think, informs
12 how we make sense of this record.

13 Another example of how rushed this
14 was, because I -- I think the judge was very
15 sensitive to the sequestered jury's hardship,
16 the liability phase ended a day earlier than
17 expected. And afterward, counsel sought to
18 have a continuance of a day because their
19 single expert was subpoenaed in Texas. The
20 judge denied that and forced counsel to proceed
21 without their -- their single witness.

22 JUSTICE GORSUCH: Counsel, I
23 appreciate all of that, and I -- I understand
24 this was not a model by anybody's stretch of
25 imagination. But I didn't see where the

1 defense counsel even mentioned the word
2 "pretext" to the court anywhere in the
3 transcript until after trial.

4 MR. PERKOVICH: Right.

5 JUSTICE GORSUCH: And given that,
6 could somebody read this as saying I don't have
7 a pretext argument, you know? I mean -- and
8 one of Ms. -- colleagues emphasized we're under
9 D2, so we're not asking did she waive; we're
10 asking whether the Mississippi Supreme Court
11 could reasonably -- any reasonable jurist could
12 reasonably conclude that she waived the
13 argument by not mentioning even the word. How
14 do I get -- help me with that.

15 MR. PERKOVICH: There's a fair amount
16 to unpack there, Justice Gorsuch. I'll try
17 with the waiver question as sort of the -- the
18 end of this process.

19 So before that is -- is a finding, a
20 determination from the supreme court that there
21 was a -- a -- a failure to rebut. And -- and,
22 again, the effort is to be heard. The response
23 from the court is this is clear in the record.
24 And then the line's drawn under Batson and a
25 shift is to the other issues.

1 So the moment of truth for that was
2 then. And, as Justice Sotomayor pointed out,
3 in the motion for new trial, that was the first
4 sort of opportunity in terms of the -- the
5 basic procedure here to speak to that, which
6 was done.

7 Now the D2 point is -- is critical
8 here, but also, there -- there is a D1
9 implication in this breakdown and -- because --

10 JUSTICE GORSUCH: Well, help me with
11 the D2 because that's what I'm struggling with
12 at the moment.

13 MR. PERKOVICH: Okay.

14 JUSTICE GORSUCH: We have to decide
15 whether the Mississippi Supreme Court made an
16 unreasonable determination of fact. The
17 determination of fact here is that she waived
18 or, really, more accurately, forfeited. But
19 it's her burden, we all agree on that, to -- to
20 raise pretext. She didn't raise pretext at
21 all, anywhere.

22 MR. PERKOVICH: Well, Justice Gorsuch,
23 if I may, so there is a burden of persuasion
24 that -- that sticks with the challenger, the
25 opponent of the strike, and that's the

1 defendant. There's also a duty that the court
2 has.

3 JUSTICE GORSUCH: I -- I appreciate --

4 MR. PERKOVICH: And that's first and
5 foremost here.

6 JUSTICE GORSUCH: -- I appreciate
7 that. I appreciate that.

8 MR. PERKOVICH: And -- and -- and
9 that -- that duty's twofold, and that is to
10 make a determination, irrespective of what's
11 pressed by the advocate, and so there is a
12 parallel sort of decoupling of it that is
13 really important here.

14 JUSTICE GORSUCH: But you -- but you
15 could find no Batson violation if there's no
16 pretext argument made, right?

17 MR. PERKOVICH: Respectfully, no.
18 Actually, the -- the --

19 JUSTICE GORSUCH: Really?

20 MR. PERKOVICH: -- the cases are quite
21 clear in that regard.

22 JUSTICE GORSUCH: You don't -- if --
23 if -- if the plaintiff says -- sorry, the
24 defense lawyer says, I -- I don't have a
25 pretext argument, Your Honor?

1 MR. PERKOVICH: Well, that would be --

2 JUSTICE GORSUCH: Then there's no
3 finding required on pretext, right?

4 MR. PERKOVICH: No, Your Honor.
5 Actually --

6 JUSTICE GORSUCH: You'd say there's no
7 Batson violation, wouldn't you?

8 MR. PERKOVICH: The burden of
9 persuasion's with the opponent of the strike,
10 clearly. And if the strike is effectively
11 expressly waived in that scenario, the -- the
12 court still has --

13 JUSTICE GORSUCH: No, no, no, no, no,
14 we have -- we have -- we have step 1.

15 MR. PERKOVICH: Mm-hmm.

16 JUSTICE GORSUCH: Step 2 comes -- the
17 government's lawyer comes up with race-neutral
18 reasons. Step 3, suppose the defense lawyer
19 says, I have no pretext argument, Your Honor.

20 MR. PERKOVICH: Mm-hmm. Since the
21 inquiry has made it to step 3, the trial court
22 still has a duty.

23 JUSTICE GORSUCH: Sure, to say no
24 Batson violation basically.

25 MR. PERKOVICH: To -- to --

1 JUSTICE JACKSON: Isn't -- isn't the
2 duty to look at the totality of the
3 circumstances to determine whether or not the
4 defendant has carried their ultimate burden of
5 determine -- of -- of establishing
6 discrimination?

7 MR. PERKOVICH: That is -- yes.

8 JUSTICE JACKSON: So it may be -- it
9 may be that with respect to that particular
10 aspect of the back-and-forth, the defense
11 counsel doesn't have an argument or they say, I
12 don't have an argument. But that, I think, is
13 not the sum total of the court's obligation to
14 rule on the Batson objection.

15 The defense counsel didn't withdraw
16 the Batson -- the Batson objection.

17 MR. PERKOVICH: Right.

18 JUSTICE JACKSON: They just didn't
19 make any argument with respect to pretext
20 and --

21 JUSTICE GORSUCH: To be clear, I
22 appreciate all of that. And I appreciate that
23 the court has to make a determination. But the
24 court here did make a Batson determination. He
25 said: I find no violation.

1 Now maybe that's wrong, okay?

2 MR. PERKOVICH: Well --

3 JUSTICE GORSUCH: And I -- I
4 acknowledge it's a -- it's a muddled record,
5 but -- but he did say I find no Batson
6 violation at the end of it.

7 MR. PERKOVICH: Well, the judge --

8 JUSTICE GORSUCH: Now maybe that's
9 insufficient, but that's not what's before us.
10 What's before us is was there waiver.

11 MR. PERKOVICH: Well --

12 JUSTICE GORSUCH: And help me with the
13 D -- help me with the D2 thing. I really want
14 some help on that.

15 MR. PERKOVICH: I'm trying, Justice
16 Gorsuch, but the -- the key thing here is that
17 his understanding from this record is of two
18 steps. In other words, the equation is
19 race-neutral equals no Batson violation. It
20 completely elides the duty he has to do two
21 things, right? Once the case shifts to step 3,
22 the court has to afford an opportunity for the
23 ultimate burden of persuasion to be met and
24 make a determination, whatever is said in
25 pressing that burden of persuasion.

1 Those things exist in parallel because
2 the Equal Protection Clause is implicated here,
3 because there are concerns that are greater
4 than the defendant's, the stricken venire
5 member, the public's interest. And so all of
6 that was jettisoned here, and -- and I think
7 it's simply because he was unaware of it at
8 least in this trial.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 JUSTICE THOMAS: Justice Gorsuch asked
14 you what would happened -- happen if the
15 defense counsel said I have no pretext, no
16 refutation -- no argument on pretext. And you
17 said that there was more that the court was
18 required to do in making the determination.

19 What exactly is that? What do you
20 mean by that?

21 MR. PERKOVICH: So, Your Honor, it's
22 incumbent on the trial court to assess what is
23 before the court.

24 JUSTICE THOMAS: So what is before the
25 court, there's -- you've got the initial

1 assertion. You've got the race-neutral from
2 the prosecutor. And you have a -- a defense
3 counsel who says, I have nothing.

4 So what else is there?

5 MR. PERKOVICH: Justice Thomas, you
6 have a prosecutor who failed to question on the
7 reasons that he put forward as his proffers for
8 these strikes.

9 JUSTICE THOMAS: Were those challenged
10 by the -- as -- were those challenged by the
11 defense counsel as pretextual?

12 MR. PERKOVICH: As we've discussed,
13 Justice Thomas, she did not speak to it after
14 the step 2 proffers. And that's one of the
15 failings in this record. There was not an
16 opportunity after the step 2 proffers were --
17 were made and before the Batson challenges were
18 overruled to speak to that.

19 JUSTICE THOMAS: So you used
20 Miller-El, which brings back a lot of bad
21 memories.

22 MR. PERKOVICH: I'm sorry.

23 (Laughter.)

24 JUSTICE THOMAS: The -- you used
25 Miller-El as your model, but didn't the defense

1 counsel there challenge the race-neutral
2 assertions?

3 MR. PERKOVICH: Justice Thomas,
4 there's a radically different record in
5 Miller-El from here as Miller --

6 JUSTICE THOMAS: Just -- the only
7 portion I'm interested in is whether or not
8 defense counsel made -- whether or not defense
9 counsel there argued that this was pretextual.

10 MR. PERKOVICH: In -- in Miller-El,
11 there were --

12 JUSTICE THOMAS: Yes.

13 MR. PERKOVICH: -- there were days of
14 opportunity to address each of the strikes.
15 There was individual voir dire of each of the
16 stricken members. There was a Batson hearing
17 held dedicated to this whole inquiry.

18 JUSTICE THOMAS: Is that on the --
19 because the defense counsel challenged each of
20 the strikes?

21 MR. PERKOVICH: Well, no more than was
22 done here, Your Honor. The challenge --
23 there's no question that the Batson challenge
24 for the four strikes in question here was
25 timely, never waive -- never withdrawn.

1 JUSTICE THOMAS: Let me ask you,
2 we're -- I mean, we're focused on these
3 strikes. Did the defense counsel make strikes,
4 peremptory strikes?

5 MR. PERKOVICH: No, Your Honor.
6 And -- and one reason for that is because --
7 well, the -- I misspoke. I misspoke. Please
8 bear with me. No, they did. They certainly
9 did.

10 JUSTICE THOMAS: And how many?

11 MR. PERKOVICH: I believe it was 11.

12 JUSTICE THOMAS: And what were the
13 races of those who were stricken?

14 MR. PERKOVICH: I believe they were
15 white. And you have to also realize that the
16 venire was white for the balance of the strikes
17 that they exercised, so they -- there was no
18 other option.

19 JUSTICE THOMAS: And how many -- how
20 many were stricken by the prosecutor?

21 MR. PERKOVICH: Seven.

22 JUSTICE THOMAS: And how many -- what
23 was the racial breakdown?

24 MR. PERKOVICH: Three to four.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: Well, I -- I want to
2 understand exactly what you think has to happen
3 in a situation like this. So the prosecutor --
4 the defense counsel says, I object to the
5 peremptory challenge of this juror, and the
6 trial counsel turns to the prosecutor and says:
7 What is your reason? I think that a prima
8 facie case has been made. What is your reason?

9 The prosecutor provides a reason
10 that's race-neutral and is a reason that almost
11 every prosecutor would find is a good reason
12 for peremptory strike -- peremptorily striking
13 a juror such as here, one of the jurors, he has
14 a brother that has been convicted of
15 manslaughter, and considering that this is a
16 murder case, I don't want anyone on the jury
17 that has relatives convicted of similar
18 offenses.

19 So seems legitimate on its face. Now
20 maybe it's not, but -- and so then the trial
21 judge turns to defense counsel and says:
22 Defense counsel, anything to say? And defense
23 counsel says: Nothing to say.

24 MR. PERKOVICH: Well -- well --

25 JUSTICE ALITO: Now what -- what about

1 there? Is that in -- and then the judge goes
2 on. Is -- is that a Batson violation?

3 MR. PERKOVICH: Justice Alito, in that
4 hypothetical where the court actually turns and
5 solicits input, that would probably be a waiver
6 on -- on -- on that scenario.

7 What I want to point to with respect
8 to the proffers and, you know, family members
9 listed in the questionnaires as implicated in
10 the criminal legal system, the important thing
11 to keep in mind here is that if that was a
12 sincere concern, it would -- it would strongly
13 suggest there would be questioning about that
14 because not only are the -- the various
15 stricken venire members implicated in that but
16 others.

17 JUSTICE ALITO: Yeah, okay. I -- I
18 understand all that.

19 MR. PERKOVICH: And --

20 JUSTICE ALITO: Did defense counsel
21 have the opportunity to question these
22 witnesses -- I mean these jurors --

23 MR. PERKOVICH: Yes, Your Honor.

24 JUSTICE ALITO: -- on voir dire?

25 So the defense counsel could say:

1 Well, look, he's been very -- you know, he's
2 happy to have these white jurors who have
3 similar records. Then the judge has to make a
4 finding. But, if the defense counsel doesn't
5 say anything --

6 MR. PERKOVICH: Justice Alito,
7 there --

8 JUSTICE ALITO: -- what is the judge
9 supposed to do?

10 MR. PERKOVICH: Justice Alito, my --
11 my response to your last question was there was
12 questioning during the group voir dire. There
13 was no questioning at that point after the
14 proffers were made. And -- and, again, very
15 legitimate concern in principle, implications
16 in the criminal legal system.

17 However, if that's a sincere concern,
18 there's going to be questioning about it. And
19 I think, if we look at Miller-El, there's a
20 classic example of why, and that is with the
21 field strike in -- in Miller-El, you have
22 somebody who --

23 JUSTICE ALITO: Well, I -- okay, I
24 understand. But your -- your -- your argument
25 is that even in the example that I gave you

1 where the judge says: Defense counsel, do you
2 have anything to say about this? And defense
3 counsel says: No, nothing to say. That that
4 is not -- that there could still be a violation
5 there?

6 MR. PERKOVICH: No, I -- I -- I'm
7 conceding that --

8 JUSTICE ALITO: Okay.

9 MR. PERKOVICH: -- Your Honor.
10 That -- that would.

11 JUSTICE ALITO: So then the question
12 is, how do we interpret this record? Suppose
13 that the judge doesn't actually say that, which
14 the judge should, but suppose defense counsel,
15 as Justice Barrett was hypothesizing could
16 happen in some case, you know, defense counsel,
17 and -- and nothing is said or there's a pause
18 and nothing is said. Then what?

19 MR. PERKOVICH: Well, if there's a
20 pause and nothing is said, then that's a
21 different record from what we have. To return
22 to the -- the -- sort of these
23 legitimate-seeming race-neutral reasons, again,
24 the disinterest in questioning on any of the
25 reasons that are offered there is -- has been

1 repeatedly recognized by this Court as denoting
2 a sham.

3 In fact, that's language in -- in
4 Miller-El and Snyder as well. And so, you
5 know, it's not that that's not a in principle
6 legitimate reason. It's that it's not explored
7 because often, when it is explored, what comes
8 to light in that process is that the family
9 member really has no connection to the
10 situation and it's not disquieting for the
11 prosecution and they don't -- wouldn't use it
12 as a -- as a reason.

13 JUSTICE ALITO: Of course, yeah. But
14 that all is triggered by defense counsel
15 standing up and saying: Your Honor, I object,
16 that's a pretext. The prosecutor has not
17 applied that rule to white jurors.

18 MR. PERKOVICH: Well, no.

19 JUSTICE ALITO: That's all that was
20 required.

21 MR. PERKOVICH: Justice Alito, I'm
22 referring to the duty that the court has,
23 whatever is advanced in terms of the burden of
24 persuasion that the opponent has, the court
25 still has to be aware of what has transpired in

1 his courtroom and what has come forward in voir
2 dire, what has not come forward in voir dire in
3 terms of questioning via relevance of the
4 proffers to the case, the absence of record
5 basis.

6 You have proffers here, mental
7 problems, drug problems, there's nothing in the
8 record on that. And so the court just takes
9 that on face value, and that's not the job.
10 The job is to consider all the circumstances
11 and to discredit proffers that are put forward
12 without a basis in the record. None of that
13 happened.

14 JUSTICE ALITO: So -- so, if the
15 prosecutor says: I -- I'm striking this juror
16 because she has mental problems and the defense
17 counsel says nothing in response, the trial
18 judge has to say, well, wait a minute, you
19 know, you're just telling me the police captain
20 says that she has mental problems, they've been
21 to her house many times. We have to have the
22 police captain come in here, you know, even
23 though defense counsel hasn't said one word, we
24 have to have the defense -- the police captain
25 come here and question --

1 MR. PERKOVICH: Well --

2 JUSTICE ALITO: -- or the officers who
3 made the -- you know, the visits to the house?

4 MR. PERKOVICH: Justice --

5 JUSTICE ALITO: Is that what you're
6 saying?

7 MR. PERKOVICH: Justice Alito, those
8 officers were in the courtroom under subpoena
9 first, so -- and, again, I return to the fact
10 that --

11 JUSTICE ALITO: I'm just trying to
12 understand -- I don't want to prolong this.
13 I'm just trying to understand what you think
14 had to happen here. And your first answer was,
15 if defense counsel says nothing -- this is my
16 understanding of your first answer. If defense
17 counsel says nothing, nothing to say, Your
18 Honor, the judge can simply say, okay, fine, I
19 find that -- that it's not -- it's not a
20 racially-based challenge.

21 MR. PERKOVICH: No, Justice Alito, as
22 I've been trying to advance, there still is
23 this duty for the court to consider all the
24 circumstances bearing on racial animosity in
25 this record and to make an assessment, whatever

1 is advanced here.

2 And, obviously, our -- our -- our
3 cardinal sort of point here is that on this
4 record, you have a defense counsel seeking to
5 be heard on this, and the response from the
6 court is your case is in the record and I'm
7 going to reiterate my ruling.

8 JUSTICE ALITO: Okay. All right.
9 I -- I understand. Thank you.

10 MR. PERKOVICH: Okay.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 JUSTICE SOTOMAYOR: Going back to that
14 point, what's clear from the record here is, as
15 soon as he exercises the challenge against the
16 woman with mental problems, the prosecutor then
17 says the next juror, Juror Number 3, she was
18 Juror Number 2, and the court interrupts and
19 says: That would be a race-neutral again
20 reason as to that juror, meaning the mental
21 juror. And the prosecutor immediately goes to
22 S-3. So there's no pause there.

23 MR. PERKOVICH: None.

24 JUSTICE SOTOMAYOR: No pause between
25 the four jurors and the race-neutral reason.

1 So there's no chance for the defense attorney
2 to say anything, correct?

3 MR. PERKOVICH: That's right.

4 JUSTICE SOTOMAYOR: Now you get to
5 Juror Number 4, the same pattern, the -- I'm
6 sorry, Juror Number 5, and then he gets to the
7 last juror that's being discussed in
8 race-neutral reasons, and he immediately says
9 to her you have to start with jury selection.

10 MR. PERKOVICH: That's right.

11 JUSTICE SOTOMAYOR: Again, there's no
12 pause to say, do you have a response? When
13 you're saying to Justice Alito that defense
14 counsel should have asked questions of the
15 jurors, she was never given an opportunity,
16 you're saying, because the prosecutor never did
17 any voir -- voir dire of these jurors?

18 MR. PERKOVICH: Right.

19 JUSTICE SOTOMAYOR: So she had no way
20 of knowing that any of these things bothered
21 the prosecutor, correct?

22 MR. PERKOVICH: That's right, Justice
23 Sotomayor. As -- as I pointed out earlier, the
24 proffers were not questioned. So the only
25 questioning that this prosecutor did of

1 consequence was to do death qualification,
2 which resulted in the decimation of the black
3 venire. So you have a concentration of
4 questioning, JA 95 to 104, where, in rapid
5 succession, he's questioning, I think, 37
6 different venire members, 28 of them black, to
7 elicit responses that lead to cause strikes.

8 That's the level of questioning that's
9 going on in this record. There's essentially
10 no individual voir dire at all. There are six
11 individuals who are -- are questioned near the
12 end of voir dire and it transpires on a single
13 day.

14 JUSTICE SOTOMAYOR: So defense counsel
15 can't be faulted for not knowing what the
16 prosecutor was worried about --

17 MR. PERKOVICH: Exactly.

18 JUSTICE SOTOMAYOR: -- in asking
19 questions. Now, going to the question that --
20 at no point did the justice say -- did the
21 lawyer -- the judge here say, I'm doing step 3
22 in any way, that these were not pretext or that
23 the -- that I find them to be both race-neutral
24 and not race-based, correct?

25 MR. PERKOVICH: That's correct.

1 JUSTICE SOTOMAYOR: Now that's your
2 prong 1. And Justice Gorsuch asked -- I think
3 was asking you whether the judge made an
4 implicit finding.

5 MR. PERKOVICH: Mm-hmm.

6 JUSTICE SOTOMAYOR: The only --
7 where -- place I find that potentially is where
8 he says, "For the reasons previously stated,
9 first, the court finds there to be no" -- well,
10 "all the reasons were race-neutral as to
11 members that were struck by the district
12 attorney's office, and so the, the court finds
13 there to be no Batson violation."

14 That's not an implicit finding on step
15 3 because he's still relying simply on step --
16 on -- on the race neutrality, correct?

17 MR. PERKOVICH: Yes, Justice
18 Sotomayor.

19 JUSTICE SOTOMAYOR: So there's not
20 even an implicit Batson finding --

21 MR. PERKOVICH: I don't --

22 JUSTICE SOTOMAYOR: -- under step 3.

23 MR. PERKOVICH: Yes. I don't see how
24 you can read that and -- and take away the
25 suggestion of anything more than a

1 determination of race neutrality. And, as I've
2 tried to emphasize, there is a very big
3 difference between race-neutral and credible.
4 And that court has to make a credibility
5 finding no matter what else happens in that
6 courtroom.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice Gorsuch?
9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: Just on Justice
11 Thomas's and Justice Gorsuch's questions, if
12 the trial judge had said do you have any
13 response and they'd said we have no pretext
14 argument, that's the essential equivalent of
15 withdrawing the Batson objection. At least
16 that's my view.

17 MR. PERKOVICH: Yes.

18 JUSTICE KAVANAUGH: But what happened
19 here, I gather, your position is, and what
20 Judge Mills, the district judge in the habeas
21 case found was, you know, Judge Mills said
22 perhaps Pitchford's counsel should have been
23 more assertive, but the court will not fault
24 them for failing to present specific arguments
25 on pretext when the trial court appeared to

1 have been resolute in its brusque determination
2 that no violation had occurred.

3 In other words, there was never an
4 opportunity. Now that -- the question's
5 whether that -- you know, whether the what
6 happened in the trial court was an
7 unreasonable -- whether it's unreasonable to
8 find waiver, I guess, or how you analyzed the
9 trial record, but the point is not that the
10 trial counsel said, oh, I have no pretext
11 argument, correct? Would you distinguish those
12 two things?

13 MR. PERKOVICH: Yes, Justice
14 Kavanaugh. So what we have is trial counsel is
15 seeking to be heard, right, before it's too
16 late, as the venire is being dismissed, exiting
17 the courtroom. The jury's about to be
18 empaneled. That's when she's seeking to be
19 heard, and she's rebuffed three times by --
20 it's in the record. It's -- it's clear in the
21 record there is no Batson violation and
22 let's -- let's turn to the other issues, the
23 fair cross-section issue.

24 So she's striving to be heard, and
25 then, ultimately, she's reasonably relying on

1 the court saying it's in the record. And this
2 is in the context where she raises Miller-El,
3 which had been decided about six months before
4 this trial, wherein, clearly, the ability to
5 press a case on appellate review was the letter
6 of the day. So she's relying on what the trial
7 court is saying, that this issue's over and the
8 trial is moving forward and opening argument is
9 going to happen in a moment.

10 JUSTICE KAVANAUGH: What do you think
11 about the -- Judge Mills' comment, perhaps
12 Pitchford's counsel should have been more
13 assertive?

14 MR. PERKOVICH: I think that -- I
15 think that, first, that's a -- that's a not
16 unfair criticism. We've all seen records
17 where, you know, there's more hurly-burly,
18 let's say, and -- and elbowing. But the point
19 is that she timely raised the objection.
20 That's her duty. There's not a continuing
21 objection requirement. There aren't
22 authorities supporting that.

23 And she sought to be heard before it
24 was too late. And then, at the next moment, as
25 Justice Sotomayor pointed out, where she could

1 address these issues in the motion for new
2 trial, that was done, adequately so. It was
3 fit for purpose in terms of the motion for new
4 trial.

5 So, if the judge was actually
6 concerned about these issues, he had an
7 opportunity to take the case back before it was
8 up on appeal.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: I have a few
13 clarifying questions -- excuse me -- about your
14 position.

15 One, you're not, are you, asking us to
16 revisit Ford insofar as it said that a state
17 has the flexibility to adopt procedural rules
18 for the assertion of Batson objections?

19 MR. PERKOVICH: Justice Barrett,
20 certainly, no. That -- that, I would point
21 out, is dicta, though. Ford was a case
22 where --

23 JUSTICE BARRETT: So you are asking us
24 to say something different? Or -- or do you
25 agree that states have the right to come up

1 with rules of forfeiture even for Batson
2 objections?

3 MR. PERKOVICH: Justice Barrett,
4 certainly, the implementation's left to the
5 states. And, as we've seen in Johnson versus
6 California, where there was a step 1 issue that
7 California had, there can be problems in that.
8 And what we have here with respect to step 3
9 and this particular ruling on -- on waiver and
10 the failure to rebut being the predicate for
11 that is an example of faulty implementation.

12 JUSTICE BARRETT: But you're not
13 challenging the state's ability to set
14 forfeiture rules and to say that if you don't
15 make a timely objection, you forfeited it? I
16 mean, I'm -- I'm asking you as a general rule.
17 I -- I understand your argument that it
18 would -- that she wasn't given a fair
19 opportunity here. I'm not asking about that
20 right now.

21 I'm just saying you don't disagree, do
22 you, with the fundamental proposition that a
23 state can establish procedural rules requiring
24 the timely assertion of Batson objections?

25 MR. PERKOVICH: Justice Barrett, the

1 last formulation you gave I would agree with,
2 certainly.

3 JUSTICE BARRETT: You would agree with
4 that. Great.

5 MR. PERKOVICH: The very last
6 formulation, though.

7 JUSTICE BARRETT: Okay. Thanks.

8 MR. PERKOVICH: You're welcome.

9 JUSTICE BARRETT: The other question I
10 have, it's a little bit difficult to tell at
11 some points in your -- your brief, I -- I read
12 your brief to maybe be taking the position that
13 an appellate court has an obligation to conduct
14 the Batson challenge, a Batson analysis, sorry,
15 even if it wasn't made below. So, for example,
16 that the Mississippi Supreme Court here
17 actually had a duty to conduct the comparative
18 juror analysis?

19 MR. PERKOVICH: Well, I think the
20 first point here is that the understanding of
21 its own law for Batson was that it could not,
22 right, and that it was unable to consider
23 arguments pressed for the first time on appeal,
24 especially in a context where the first
25 opportunity to do that was on appeal. That's a

1 problem.

2 And so it's that fundamental
3 misunderstanding of this Court's law and that
4 basic gateway rule at the outset of the appeal
5 that is the first problem with that.

6 JUSTICE BARRETT: So what is your
7 position, that -- that the -- that an appellate
8 court has the discretion and should understand
9 itself to have the discretion to consider it
10 for the first time on appeal but not an
11 obligation to do it?

12 MR. PERKOVICH: Justice Barrett,
13 it's -- this -- this Court's holdings have
14 relied repeatedly on comparison that's been
15 pressed in the first place on appeal, and --

16 JUSTICE BARRETT: But is it an
17 obligation or do you just have the discretion?
18 Just -- just pick one.

19 MR. PERKOVICH: I'll -- Justice
20 Barrett, I'll pick discretion with the caveat,
21 though, that the language of this Court is a
22 must, right? If we look --

23 JUSTICE BARRETT: So is it obligation
24 or discretion?

25 (Laughter.)

1 JUSTICE BARRETT: The law sounds like
2 obligation. It's just not how I read our
3 precedents.

4 MR. PERKOVICH: Right.

5 JUSTICE BARRETT: So you're asking for
6 us to take those precedents, if there's any
7 ambiguity in the precedents, sort of take them
8 a step farther to say there's an obligation?

9 MR. PERKOVICH: I think that the
10 precedents have to be surmised from what the
11 Court is doing and how it's getting to the
12 results in terms of the holding for clearly
13 established law. And what the Court has done
14 routinely is take argument, comparative
15 analysis that's really not viable in most trial
16 settings and -- and hear that on appeal in the
17 first instance because of the -- the concerns I
18 was speaking to earlier.

19 JUSTICE BARRETT: Okay, okay. So do
20 you think we have what we need if we were to
21 conduct that comparative analysis now to find a
22 Batson violation now?

23 MR. PERKOVICH: I think,
24 unfortunately, that was the ball game for the
25 state supreme court, and -- and, there, they

1 elected not to do that. They had -- in that
2 fork in the road, they could have taken what
3 was submitted on appeal and make a merits
4 decision or remand it.

5 JUSTICE BARRETT: So there was
6 sufficient evidence in the record on the
7 comparative juror point. The comparative juror
8 analysis, there was -- it's your position that
9 the record is there and the Mississippi Supreme
10 Court could have, based on the record before it
11 or that we could now, say that there was a
12 Batson violation based on what was introduced
13 about comparative juror analysis on appeal?

14 MR. PERKOVICH: Justice Barrett, yes,
15 it was incumbent on the supreme court to take
16 that comparison analysis or remand it to the
17 trial court to conduct.

18 JUSTICE BARRETT: But is it your
19 position that that comparative juror analysis
20 is sufficient, that it was there and the
21 Mississippi Supreme Court had what it needed to
22 find a Batson violation based on what you had?

23 MR. PERKOVICH: Yes, Justice Barrett.
24 And the court had done just that in other
25 cases.

1 JUSTICE BARRETT: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: So I'd like to get
5 your reaction to what I hear your argument as,
6 and I just want to make sure I -- I've got it
7 straight.

8 That the making of a Batson objection
9 at the beginning of this process actually
10 triggers duties on both the parties' parts and
11 the court's part, so, obviously, you make the
12 objection and then we say at step 1 the defense
13 counsel has the duty to establish whatever the
14 prima facie case is. The burden then shifts.
15 The duty becomes the state's to offer
16 race-neutral non-discriminatory reasons.

17 And then, ultimately, there is a duty
18 of the court to actually resolve the objection,
19 so -- the initial Batson objection.

20 So, to the extent that people have
21 asked what was supposed to happen here, I
22 suppose, if we're in a world that Justice
23 Thomas posits, if the defense counsel, when we
24 get to step 3, the trial court says: Counsel,
25 and defense counsel says: Your Honor, I have

1 no argument on pretext, well, first of all, you
2 would, I think, expect the court to say: So
3 are you withdrawing your Batson objection,
4 counsel? I mean, Justice Kavanaugh says, well,
5 that's sort of implicit, but I think the court,
6 because it has a duty to resolve the objection,
7 has to be clear about whether this thing is
8 still on the table once counsel affirmatively
9 says I don't have any pretext evidence.

10 So right there we have a problem with
11 the court not clarifying whether this objection
12 is still live in -- in the world of even
13 asking. But -- but, in the world of not
14 asking, one -- not asking the -- the defense
15 counsel whether there's any pretext evidence,
16 you would still have the court have to resolve
17 the objection, right?

18 MR. PERKOVICH: Yes.

19 JUSTICE JACKSON: I mean, in -- in --
20 in -- in -- you -- you would expect the court
21 to say something like: Hearing no evidence or
22 argument related to pretext and seeing no basis
23 in this record for determining that the
24 prosecutor's race-neutral reasons were
25 pretextual, I find that there is no race

1 discrimination or whatnot, right?

2 Like, the court has to make a
3 finding --

4 MR. PERKOVICH: Yeah.

5 JUSTICE JACKSON: -- that indicates
6 that it's actually resolving the -- the
7 objection on the basis of all of the evidence
8 presented after all of the steps.

9 And it seems to me that there's kind
10 of like a problem here that the lack of clarity
11 is a problem for the court because it suggests
12 that the court did not fulfill all of its
13 obligations triggered by the initial Batson
14 objection.

15 Does that comport with sort of what
16 you're trying to say at least about what the
17 court's duties were here?

18 MR. PERKOVICH: Yes, Justice Jackson.
19 Again, counsel has a duty to press the case and
20 the ultimate duty or -- or burden of
21 persuasion, but that's simultaneous with the
22 duty that by the time this gets to step 3 in
23 the burden framework, it remains with the court
24 to do the things that you've outlined.

25 JUSTICE JACKSON: And the court can

1 say there's not evidence that there's
2 discrimination here.

3 MR. PERKOVICH: Yes.

4 JUSTICE JACKSON: You haven't
5 presented anything, et cetera. But, here, we
6 have a court that's seeming to keep the
7 defendant from making her presentation. So I
8 don't understand how it could -- it, the court,
9 could have fulfilled its obligation to look at
10 all the evidence if it has prevented
11 essentially one party from presenting.

12 Let me just ask you another final
13 question. I see this also as possibly a very
14 short opinion when we look at what
15 Mississippi's Supreme Court said. It would go
16 something like Pitchford's trial counsel made a
17 Batson objection and reraised it multiple
18 times. Each time, the trial judge reassured
19 her that it was preserved. Nevertheless,
20 Mississippi Supreme Court said it was waived.
21 That's unreasonable. The end.

22 What would be wrong with that?

23 MR. PERKOVICH: Not -- not anything I
24 can think of.

25 (Laughter.)

1 MR. PERKOVICH: I mean, we could say
2 more because, with respect to D2, obviously,
3 there -- there is a breakdown in -- in that
4 fact determination that becomes a waiver under
5 the Mississippi rule.

6 With respect to D1, you know, another
7 way to look at this is this is a case that --
8 that, you know, I don't think this Court has
9 seen where it just sort of falls off the ledge
10 at step 2. And so that's a D1 failing
11 categorically. There's just an absence of that
12 step being taken for the reasons you've
13 outlined.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Stewart?

18 ORAL ARGUMENT OF SCOTT G. STEWART
19 ON BEHALF OF THE RESPONDENTS

20 MR. STEWART: Mr. Chief Justice, and
21 may it please the Court:

22 In *Flowers versus Mississippi*, this
23 Court faced an extraordinary case and ruled
24 against the state. This case is also
25 extraordinary but in a very different way that

1 requires a very different result. Start with
2 the facts in D2.

3 Petitioner claims that the state
4 supreme court was objectively unreasonable in
5 finding that he waived his pretext arguments.
6 As Petitioner once admitted, that is wrong.
7 Years ago, Petitioner declared that he failed
8 to "properly challenge, litigate, and preserve"
9 his pretext arguments.

10 Petitioner also now claims that the
11 trial judge thwarted his efforts to argue
12 pretext. Years ago, he said the opposite. He
13 declared that he "made no attempt to rebut or
14 otherwise offer argument or evidence" on
15 pretext.

16 In short, Petitioner once declared
17 that the facts are X. He now declares that it
18 is objectively unreasonable to find that the
19 facts are X. That is extraordinary.

20 Now take the law. In Ford versus
21 Georgia, this Court ruled the lower courts can
22 adopt timely preservation rules to implement
23 Batson. Many courts have done that and adopted
24 a waiver rule like the one applied here.
25 Petitioner ignores Ford -- Ford versus Georgia,

1 he never cites it once, and he asks this Court
2 to declare that a rule adopted by most federal
3 courts of appeals is not just wrong but
4 objectively unreasonable. That is
5 extraordinary.

6 Petitioner also claims that the state
7 trial judge failed to conduct step 3 of Batson.
8 That was the core of his presentation this
9 morning. That defies what the trial judge
10 said, and it once again defies what
11 Petitioner has said.

12 Years ago, Petitioner agreed that the
13 trial judge conducted step 3. On direct
14 appeal, he declared in his reply brief that the
15 judge "made a final ruling of
16 non-discrimination." That is step 3. That is
17 page 484 of the Joint Appendix. He then ties
18 that in a footnote to the same pages we cite
19 here for that finding.

20 As I said when I began, this case is
21 extraordinary. Petitioner has conceded all
22 that is central to his claim. Never has this
23 Court granted relief under AEDPA when a habeas
24 petitioner has so decisively doomed his own
25 case. This case should not be the first.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: But counsel is
3 arguing that notwithstanding what the defense
4 counsel failed to do, the judge had a more
5 active or more robust role to play.

6 What's your reaction to that?

7 MR. STEWART: No case of this Court
8 says -- says that. No -- no holding of this
9 Court clearly establishes that, Justice Thomas.
10 What this Court -- Court's cases say is, at
11 step 3 of Batson, the trial judge, if it
12 reaches that stage, must make a finding on
13 purposeful discrimination, whether the
14 defendant has carried his burden. The judge
15 did that here.

16 JUSTICE THOMAS: The counsel also
17 argues or at least uses Miller-El as a model.
18 What was -- what was -- what is your reaction
19 to what he said about Miller-El and what it
20 requires?

21 MR. STEWART: I think Miller-El
22 requires really no more than, on federal habeas
23 review, state courts cannot make factual
24 rulings that are objectively unreasonable.
25 That's all Miller-El decided. It didn't reach

1 the validity of a state procedural rule. It
2 didn't rely or -- or cite or overrule or even
3 touch Ford versus Georgia. It didn't reach any
4 of those things at all.

5 JUSTICE THOMAS: How would -- how
6 would Petitioner here have preserved under
7 Mississippi law the -- would not have waived
8 these claims under Mississippi law?

9 MR. STEWART: I think it would have
10 been quite easy, Justice Thomas. I mean, he
11 could have said for -- for each of these
12 challenges it would have just been two or three
13 sentences, perhaps for Mr. Tillman, just one
14 sentence. I mean, for Ms. Lee, who -- who was
15 late, he could have said, Your Honor, I mean,
16 other jurors were -- were late, you just
17 refused to strike her for cause and there's no
18 evidence of mental problems that should be
19 explored. That would have preserved and
20 unlocked the panoply of arguments that he later
21 made about her in comparisons on appeal. He
22 could have easily done that.

23 JUSTICE JACKSON: But didn't the court
24 say it was preserved? I mean, she was
25 obviously saying, I would like to make my

1 record with respect to the Batson observations.
2 So the Chief Justice points out she says, at
3 some point, I would like to do that.

4 So you just articulated the kind of
5 thing you would have expected her to say, and
6 I'm trying to figure out when she was supposed
7 to be or given when she was supposed to have
8 that opportunity.

9 MR. STEWART: Sure. At -- at page
10 169, at page 170, at 175, 176, she could have
11 said that anywhere there, Your Honor -- Justice
12 --

13 JUSTICE JACKSON: You mean --

14 MR. STEWART: -- Jackson.

15 JUSTICE JACKSON: -- when -- when --
16 when the objections were happening?

17 MR. STEWART: Oh, yes. Of -- of
18 course.

19 JUSTICE JACKSON: Did she have to?
20 Could she have done it after all of those
21 objections were lodged?

22 MR. STEWART: Sure. She just had --
23 she had to do --

24 JUSTICE JACKSON: But -- but when she
25 went to do that, when she -- when she tried to

1 do that, she said at some point I'd like to do
2 that, and the court said you've already done
3 it. So whose mistake is that?

4 MR. STEWART: He did not say you've
5 already done it, Justice Jackson. What he said
6 was you preserved your Batson objection --

7 JUSTICE KAVANAUGH: He said I -- he
8 said I think you've already made those and
9 they're clear in the record. And that's after
10 another sentence where she adds -- she doesn't
11 say "at some point." She then says, "I don't
12 want to let the paneling of the jury go by
13 without having those objections." And the
14 court says, "I think you already made those,
15 and they are clear in the record. For the
16 reasons previously stated, the court finds
17 there to be no -- well, all the reasons were
18 race-neutral as to members that were struck by
19 the district attorney's office. And so the
20 court finds there to be no Batson violation."

21 MR. STEWART: Right.

22 JUSTICE KAVANAUGH: She's trying to
23 make the objections right there, and he says
24 you already made them and there's no Batson
25 violation, and he makes a legal error in the

1 course of that by saying because they're
2 race-neutral, there's no Batson violation,
3 which of course is not the correct inquiry, I
4 think you would -- you would acknowledge.

5 MR. STEWART: I think -- so two -- two
6 responses on that.

7 JUSTICE KAVANAUGH: So right there,
8 she's trying, I think. I mean, she could have
9 been more assertive. Judge Mills -- so your
10 opening, like, was -- was forceful. Judge
11 Mills is a very experienced district judge. He
12 had been a former Mississippi Supreme Court
13 justice. He knows what he's doing.

14 He read the record entirely
15 differently than you did. And he pointed to
16 this -- this -- this part right here where
17 she's trying, I think -- we weren't there; we
18 don't have an audio recording -- to -- to make
19 the objections, and -- and the court says you
20 already made those, they're clear, and the
21 court finds there to be no Batson violation.

22 I don't know, at that point, she could
23 have said, well, you're wrong, Judge. I get
24 that. And Justice Alito has a good -- good
25 points on that. But seems pretty clear at that

1 point.

2 MR. STEWART: Well, Your Honor, she
3 preserved her objection. She didn't preserve
4 the pretext arguments, which are different than
5 making a prima facie case or the objection
6 itself. Comparative juror arguments are very
7 different in response to the state's reasons
8 than simply making a prima facie case. And she
9 didn't raise those.

10 JUSTICE KAVANAUGH: You don't think at
11 that moment right there she -- she's not
12 prepared to do that?

13 MR. STEWART: I mean -- not at all,
14 Your Honor. I mean, the very next page on page
15 176 --

16 JUSTICE KAVANAUGH: I don't know. He
17 says there is no Batson violation per se. And
18 I don't know. I mean, that's where Judge Mills
19 says perhaps she could have been more
20 assertive. And I take that point, and that's
21 why this is hard.

22 MR. STEWART: Well -- and I think --
23 and this would get back to, I think, you know,
24 you -- you I think framed it correctly earlier,
25 Justice Kavanaugh, where you said, look, is it

1 objectively unreasonable, is (d)(2) met?

2 And I think the ways we know that are
3 a number of them. First of all, Ms. Steiner
4 speaks only from page 158 to 176 of the
5 transcript. During that time, she at least
6 five times inserts arguments or objections
7 without any prompting by the trial court.
8 There's this talk about are there pauses in the
9 trial court? There are no indication of pauses
10 in here. Yet, five separate times, in addition
11 to all the arguments she makes, she inserts
12 herself. I mean, that was the Batson
13 objection. They didn't -- you know, there's no
14 indication that the judge paused, looked at her
15 and, said, well, you make a Batson objection.
16 She inserted that. She inserted the bench
17 conference.

18 I close the point by noting, at page
19 176, that the judge then did allow her to state
20 the composition of the jury, her assertions
21 about the composition of a county. And, you
22 know, so she -- she had an opportunity to add
23 more, and that's all she added, was bare
24 numbers.

25 Then we looked at post-trial motion.

1 Even when she had days and days, all she came
2 up -- and this was belatedly -- was the amended
3 motion for a new trial, belatedly comes up with
4 one sentence that points the judge to nothing
5 about these comparisons.

6 JUSTICE KAVANAUGH: Well, that's --

7 JUSTICE KAGAN: But, General --

8 JUSTICE KAVANAUGH: -- in the course
9 of -- go ahead.

10 JUSTICE KAGAN: I mean, I think you
11 made the point that she didn't do very well,
12 you know, that she could have done a lot better
13 than she did. But that's really not the
14 question before us. The question is whether
15 she's waived her objection. And three times,
16 she's told by the court that the objection has
17 been preserved.

18 So you're right, General, she should
19 have said a lot more stuff. She should have
20 been more assertive. But the only question
21 before us is, did she waive her objection when,
22 three times, she's told by the court you're
23 objection is in the record, I hear you?

24 MR. STEWART: And this is critical,
25 Justice Kagan. The Mississippi Supreme Court

1 did not hold that her objection was waived. It
2 held that her pretext arguments were waived.
3 It upheld the finding --

4 JUSTICE KAGAN: That's slicing the
5 baloney very thin.

6 (Laughter.)

7 MR. STEWART: It's -- it's -- Justice
8 --

9 JUSTICE KAGAN: I'm sorry, General
10 Stewart.

11 MR. STEWART: My apologies, Justice
12 Kagan.

13 JUSTICE KAGAN: Here we are after the
14 prosecutor has done all his here's my
15 race-neutral reason, here's my race-neutral
16 reason, and then the defense counsel says: I'm
17 not persuaded, I need to -- you know, I need to
18 say something about this. I still have an
19 objection. Well, at that point, of course,
20 she's objecting to the ultimate finding.

21 MR. STEWART: I mean, she --

22 JUSTICE KAGAN: This is after the
23 prosecutor has given all his race-neutral
24 reasons, and she's still objecting. So what
25 could she be objecting to at that point?

1 MR. STEWART: Oh, I agree --

2 JUSTICE KAGAN: She must be objecting
3 to the fact that either the race-neutral
4 reasons aren't credible or they're -- you know,
5 or they're -- or they're -- they're pretextual.
6 That's what she's objecting to.

7 MR. STEWART: But --

8 JUSTICE KAGAN: There's no other way
9 to read the context of this colloquy without
10 saying that at that point she's objecting,
11 she's saying what the prosecutor gave you
12 wasn't enough.

13 MR. STEWART: I agree that she is
14 maintaining her Batson objection, Your Honor.
15 I don't agree about the comparative juror
16 pretext arguments that she made no suggestion
17 of making despite many opportunities to do so.

18 JUSTICE KAGAN: I think you're arguing
19 this on the merits. I think you're saying she
20 didn't say enough to allow the court to find
21 for her.

22 But that's not the question before us.
23 The question before us is whether the -- the
24 state supreme court was right when it said she
25 waived her argument. She might not have

1 presented a good argument, but she didn't waive
2 her argument.

3 MR. STEWART: She -- and -- and,
4 respectfully, Justice Kagan, the Mississippi
5 Supreme Court didn't say she waived the
6 argument writ large. It said she waived -- she
7 waived the pretext arguments that she never
8 presented to the trial judge. And that's
9 critically different.

10 Justice Graves said in dissent, my
11 friend -- my friend in state federal habeas
12 petition, agreed that the Mississippi Supreme
13 Court resolved the claim on the merits. It
14 held that the Batson pretext arguments, the
15 comparative juror arguments that she had never
16 made to the trial judge, that's what she
17 waived. That's what she failed to --

18 JUSTICE KAVANAUGH: Well, let me just
19 follow up on Justice Kagan's questions. After
20 the prosecutor gives the asserted race-neutral
21 reasons, what else could she be objecting to
22 than those were pretextual?

23 MR. STEWART: I mean, I -- I think
24 what we -- I mean, she -- I think she's saying,
25 like, I -- I believe that I've made my case. I

1 mean --

2 JUSTICE KAVANAUGH: No, no, no.
3 Answer my question. After the prosecutor has
4 given the asserted race-neutral reasons, what
5 else could she be objecting to other than that
6 they were pretextual?

7 MR. STEWART: I -- I mean, I think
8 she's -- are you talking about page 175,
9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: Exactly.

11 MR. STEWART: Okay. I think there
12 she's just making sure that her objection is
13 preserved in the record.

14 JUSTICE KAVANAUGH: What else that's
15 after the asserted -- just answer my question
16 -- after the prosecutor has given the asserted
17 race-neutral reasons, and she goes back to
18 Batson, at that point what else could she be
19 objecting to other than that the asserted
20 reasons were pretextual?

21 MR. STEWART: I mean, I think it's the
22 ultimate conclusion the district judge reached
23 or -- pardon me -- the trial judge reached,
24 that they were -- that they were race-neutral,
25 in fact, and she hadn't shown discrimination.

1 I mean, I think that --- that's why I think she
2 -- she uses the word "reserve." And I think
3 she wants to make sure -- I mean, that's --
4 that's the 175. She says I'd like to reserve
5 my --

6 JUSTICE KAVANAUGH: And then she --
7 then that's the first sentence. The second
8 sentence, I don't want to let the paneling go
9 by without having those objections and then
10 repeat myself. I think you've already made
11 those, says the judge, and they were
12 race-neutral.

13 Can I ask a separate distinct
14 question, just one question, which is in the
15 course of that paragraph, the court says -- and
16 this is now (d)(1) question --

17 MR. STEWART: Yes, Your Honor.

18 JUSTICE KAVANAUGH: The court says,
19 the trial court, "all the reasons were
20 race-neutral as to members that were struck by
21 the district attorney's office, and so the
22 court finds there to be no Batson violation."

23 Is that a legally correct analysis of
24 Batson?

25 MR. STEWART: It -- it is in that it

1 means that he is finding the actual -- the
2 reasons to be race-neutral in fact. Like, he
3 is --

4 JUSTICE KAVANAUGH: But is that the
5 end of the Batson analysis, in your view?

6 MR. STEWART: I mean if -- if he's
7 finding them to be the actual reasons, the
8 race-neutral reasons, in fact, then yes.

9 JUSTICE KAVANAUGH: Now, if they're --
10 if they're race-neutral, is that the end of the
11 Batson analysis?

12 MR. STEWART: If -- if it's just -- if
13 the question is just are they facially
14 race-neutral, then that's step 2, Your Honor.

15 JUSTICE KAVANAUGH: Right. And that's
16 not the end of the Batson analysis, correct?

17 MR. STEWART: The -- whether there's a
18 facial justification it's race-neutral is not
19 the end of the Batson inquiry.

20 JUSTICE KAVANAUGH: Thank you.

21 MR. STEWART: What -- what I'm --

22 JUSTICE KAVANAUGH: That's -- Thank
23 you.

24 JUSTICE ALITO: But whether in the end
25 they are race-neutral is the question, right?

1 MR. STEWART: That's right, Your
2 Honor.

3 JUSTICE ALITO: And as to what she was
4 objecting to, if she wasn't tacitly raising a
5 pretext argument, what she said on 176 is
6 "Allow us to state into the record there is one
7 of 12 -- of 14 jurors -- are non-white, whereas
8 this county is approximately, what,
9 40 percent?" What she's -- what she's saying
10 is that the racial makeup of the jury that was
11 selected was so starkly different from the
12 racial makeup of the county that that would be
13 sufficient to find that there were Batson
14 violations.

15 MR. STEWART: Right -- that's right,
16 Your Honor. And actually in the cert petition
17 at page 38, the Petitioner emphasized this
18 point as being part of the Batson --

19 JUSTICE SOTOMAYOR: Counsel, I don't
20 know how that could be. She starts her
21 colloquy in that section by saying I want --
22 at -- at some point the defense is going to
23 want to reserve both its Batson objection and a
24 straight for Tenth Amendment racial
25 discrimination.

1 That reference, I -- I don't think it
2 was on the Tenth Amendment. I think what she
3 meant was the -- the earlier objection that
4 they spent a lot of time in voir dire on, on
5 the cross -- whether the jury pool was a
6 representative body, correct? There had been
7 two objections.

8 MR. STEWART: Two objections there,
9 Your Honor.

10 JUSTICE SOTOMAYOR: All right. So
11 she's talking about the cross-reference -- the
12 representation argument and the Batson
13 argument.

14 On the Batson argument, the court
15 starts with that and says: You have already
16 made it in the record so I'm of the opinion it
17 is in the record. She says, I don't want to
18 let the paneling of the jury go by without
19 having those objections. And the court thinks
20 -- I think you already made those. And they
21 are clear in the record for the reasons
22 previously stated, he says, all the reasons
23 were race-neutral, blah, blah, blah.

24 And then as to the other issue, the
25 other issue is the jury pool issue, oh, I've

1 already ruled based on prior rulings from this
2 -- the United States Supreme Court and the
3 state of Mississippi that jury selection was
4 appropriate. That's -- that the jury itself,
5 the pool, was appropriate. And those are noted
6 for the record.

7 It is then when she starts talking
8 about the jury pool as a whole, that as a whole
9 and not on the Batson question. So I'm not
10 quite sure that you're fairly representing her
11 use of that one example or their colloquy on
12 that one example.

13 MR. STEWART: Let me cite you
14 something that shows it is -- it is a fair
15 representation. It's page 38 of the cert
16 petition. That's Petitioner's filing where he
17 ties that very exchange to his preservation of
18 his Batson claim.

19 JUSTICE JACKSON: But, counsel, I -- I
20 think in fairness, Justice Kavanaugh asked you
21 what more could she have done or why wasn't
22 she, you know, responding to or trying to say
23 that there's pretext when she was talking about
24 the Batson question.

25 You pointed to this 40 percent issue

1 that she talks about, the 12 of 14 jurors, but
2 as Justice Sotomayor points out, that
3 discussion was in reference to the jury
4 composition issue and not the Batson issue.

5 So regardless of what was happening in
6 the cert petition, I'm talking about what's
7 going on in the trial record in the discussion
8 that they were having.

9 It looks as though the court resolved
10 the Batson question by not giving her a chance
11 to make any more arguments or say anything more
12 about it, and then he says, the court, then as
13 to the other issues, and he moves on to
14 composition, and that's when she starts making
15 statements about 12 of 14 jurors are non-white.

16 So I think we have to be clear about
17 what's actually happening in the record and not
18 ascribe to her representations that actually
19 don't fit.

20 MR. STEWART: Can I make -- make two
21 quick responses to that, Justice Jackson? One
22 is my friend conceded this morning that that
23 point went to her trying to get to the Batson
24 claim itself. And also --

25 JUSTICE JACKSON: Okay. Well, that's

1 just not what the -- what the transcript says.

2 MR. STEWART: But Your Honor, we're
3 here on AEDPA relief. And the question is
4 whether a reasonable fact finder could conclude
5 this.

6 JUSTICE JACKSON: No, I'm not talking
7 about the question. I'm talking about what the
8 court said they were talking about at that
9 moment. He resolved the Batson issue and then
10 he says: And then as to the other issues, and
11 there were two issues, and the other issue was
12 about jury composition. And that's the one
13 that she responds to with the relevant data.

14 MR. STEWART: And respectfully, I
15 don't agree. He conceded otherwise, Your
16 Honor, and --

17 JUSTICE JACKSON: Okay.

18 MR. STEWART: -- it would also -- and
19 she did it without prompting. There was --
20 there was no, you know, would you like to say
21 more? I mean, she said the more that she
22 wanted to say. And the key thing is even when
23 she had that opportunity, she did not present
24 the comparative juror argument.

25 JUSTICE JACKSON: I don't think it

1 helps -- I don't think it helps to -- to -- to
2 misrepresent what the record obviously shows.

3 Let me ask you another question
4 because it seems as though the Mississippi
5 Supreme Court is trying to have it both ways
6 with respect to the significance of her
7 arguments related to pretext.

8 Is -- is -- is it your position that
9 the argument -- that her argument was so
10 central that the failure to present it waives
11 any obligation of the court to rule on whether
12 the reasons that the state has given a
13 race-neutral and, therefore, there's no Batson
14 violation here? Because she didn't say
15 anything about it or, as you interpret the
16 record, that alleviates the court of any
17 obligation to say, that's one thing that I
18 think the Mississippi court is saying, but, on
19 the other hand, they also say it isn't
20 necessary for the court to give her a chance.

21 So either it's central, in which case
22 the court had to give her a chance, or it's not
23 central, in which case the court had to rule on
24 it, I think, in -- regardless. So which is it?

25 MR. STEWART: I'm not sure I'm

1 completely following the question, Justice
2 Jackson. What I -- what I would say --

3 JUSTICE JACKSON: What is the
4 significance of her argument related to
5 pretext? Is it so necessary that without it,
6 the court is relieved of any obligation to
7 continue to look at the facts and to actually
8 make a finding or is it not necessary, in which
9 case it seems to me that the court needed to do
10 that regardless of the fact that she didn't
11 bring any argument about it.

12 MR. STEWART: Right. So I -- I think
13 when you're -- if you get past step 2, the --
14 the court has to make an ultimate finding on
15 non-discrimination. But it does so in light of
16 the party's submissions.

17 No -- no precedent of this Court
18 requires the judge to consider matters,
19 especially intricate competitive -- compare --
20 comparative juror arguments that are not
21 presented to it. I mean that's something this
22 Court --

23 JUSTICE JACKSON: And your view is
24 that --

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Jackson?

2 JUSTICE JACKSON: I just wanted to
3 say, and your view is that if the court has to
4 do its obligation in light of the parties'
5 evidence, the court does not have the
6 obligation to turn to her and say what is your
7 evidence about this? The court doesn't have to
8 solicit the evidence from this party or give
9 her an opportunity to present it?

10 MR. STEWART: Well, doesn't have to
11 affirmatively do that. There's every
12 indication that in the trial -- in the record
13 here and a reasonable person could certainly
14 read the record to allow multiple opportunities
15 to present that. There's nothing supporting
16 the idea that the trial judge cut her off or
17 certainly nothing compelling that view of the
18 record, Justice Jackson.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: Yes. General
23 Stewart, would you -- you were about to discuss
24 the role of AEDPA in our review, much of this
25 is being discussed as though we're on de novo

1 review. So would you discuss what AEDPA
2 requires?

3 MR. STEWART: Sure, Your Honor. And I
4 think we've been very focused on the (d)(2)
5 piece so I'll -- so I'll -- I'll lead with
6 that. There have been various discussions
7 about, you know, could the record be read this
8 way, are there pauses that allowed her to --
9 you know, to step in, did the trial judge
10 actually turn to her and give her this
11 opportunity. You know, I heard lack of
12 clarity.

13 All those things mean that the -- that
14 the Petitioner can't be granted relief under
15 (d)(2). The record has to compel a finding
16 that the trial judge failed on some factual
17 matter and it just cannot possibly compel that
18 finding.

19 As I've emphasized, I mean, Petitioner
20 himself took a very different view of the --
21 the record and he now says the view that he
22 took is objectively unreasonable. And I think
23 that goes for the legal matters too, Your
24 Honor. There has to be something objectively
25 unreasonable here.

1 And the record can be read certainly
2 either of two ways. That would be enough on
3 clear error review, Anderson versus Bessemer
4 City. It's certainly enough for the state
5 under AEDPA.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Justice Alito?
8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: You seem to be
10 suggesting that the only way that we could
11 overturn the Mississippi on AEDPA is if the
12 district court had said to her: Sit down,
13 counsel, you made your Batson challenge,
14 period. Anything short of that, they couldn't
15 err in finding a way -- a non-waiver -- a
16 waiver?

17 MR. STEWART: I mean given the
18 entirety of this record there's -- there's no
19 --

20 JUSTICE SOTOMAYOR: No, no, no. I'm
21 saying your argument seems to be that only if
22 the trial court said counsel, sit down, Batson
23 has been preserved, I don't want to hear
24 anymore, that that's the only way that on AEDPA
25 review we could say Mississippi made an

1 unreasonable determination of fact?

2 MR. STEWART: I mean, again, given --
3 given this record, I think you would need
4 something like that.

5 JUSTICE SOTOMAYOR: Where have we ever
6 said that a waiver has to be that explicit?
7 Don't we infer it from evidence?

8 MR. STEWART: Well, I mean, even if
9 that were true, Justice Sotomayor, this gets
10 back to --

11 JUSTICE SOTOMAYOR: Well, even if it's
12 true, AEDPA, and unreasonable, doesn't mean
13 that all interpretations of a record are
14 correct. I would like you to point me to one
15 part of this record, one word by the court that
16 says do you have something more on race
17 neutrality?

18 MR. STEWART: But that's exactly the
19 point, Justice Sotomayor. She has none of
20 that. And she has multiple indications that
21 she could have --

22 JUSTICE SOTOMAYOR: No, the problem --

23 MR. STEWART: -- that she could
24 have -- she could have asserted --

25 JUSTICE SOTOMAYOR: -- is that she was

1 never given an opportunity on this record.

2 MR. STEWART: And --

3 JUSTICE SOTOMAYOR: The way the
4 record -- well, we can go -- I'm not going to
5 argue with you on this point. The record
6 speaks for itself.

7 MR. STEWART: May I respond just
8 briefly? I think I could say something helpful
9 on this, Justice Sotomayor.

10 JUSTICE SOTOMAYOR: No, no, no. I was
11 going to ask one last question, okay, on the
12 preservation issue -- not on the preservation
13 issue, on the comparative jury analysis on
14 appeal, the comparative jury analysis on
15 appeal.

16 In answer to Justice Barrett's
17 question, appellate courts can do their own
18 comparative juror analysis even if not
19 preserved below, correct?

20 MR. STEWART: They can.

21 JUSTICE SOTOMAYOR: That's what
22 happened in Miller-El and Snyder.

23 Do you believe the Mississippi Supreme
24 Court says it cannot consider those arguments
25 because of the waiver or that it's choosing not

1 to consider them?

2 MR. STEWART: It's -- it's saying that
3 in general it does not. It can exercise its
4 discretion to do so. We know that --

5 JUSTICE SOTOMAYOR: It could do so?

6 MR. STEWART: It could do so.

7 JUSTICE SOTOMAYOR: So is that a plain
8 error standard? Because plain error is what
9 federal courts use to review evidence that has
10 not been presented -- an objection that has not
11 been preserved below. Could it -- it would be
12 plain error, correct?

13 MR. STEWART: I mean, that's what
14 the -- that's what has been said in the case.
15 I mean, *Flowers versus State III*, the *Flowers*
16 case, I mean, what the Court said was, because
17 the error in upholding the strike of Juror
18 Pitman affects a substantial right, we apply
19 the plain error rule to find a *Batson* violation
20 occurred. So, I mean, we had the question --

21 JUSTICE SOTOMAYOR: So Mississippi has
22 a similar plain error rule? It has discretion
23 to overlook a waiver, correct?

24 MR. STEWART: It has discretion.

25 JUSTICE SOTOMAYOR: So, if the record

1 is clear that there was a Batson violation --
2 and we can argue about each individual juror
3 whether the record is clear or not -- I want
4 you to make an assumption, if the record is
5 clear that there was a Batson violation, would
6 the Mississippi court have erred in failing
7 to -- to conduct that review?

8 MR. STEWART: And the answer is no,
9 certainly not under AEDPA.

10 JUSTICE SOTOMAYOR: No, not under
11 AEDPA? It's a constitutional violation in a
12 case where the court below did not make an
13 actual step 3 analysis. You're saying that it
14 wouldn't have been error?

15 MR. STEWART: I mean, that's -- that's
16 consistent with the waiver or forfeiture of
17 constitutional objections generally and with
18 jury objections in particular.

19 JUSTICE SOTOMAYOR: Oh, that --
20 that -- we apply plain error.

21 MR. STEWART: And -- but state courts
22 don't necessarily have to do that. They can do --
23 do pure discretion. They can do different
24 approaches. Nothing in this Court's cases bars
25 that, Justice Sotomayor. And, I mean, I would

1 just emphasize that this is -- this is a rule
2 that has been embraced by most federal courts
3 of appeals, and it's one that was surely
4 reasonably applied here.

5 JUSTICE SOTOMAYOR: Yes, because we
6 apply plain error.

7 MR. STEWART: Some -- some do; some
8 don't. And, again --

9 JUSTICE SOTOMAYOR: Yeah, you always
10 have to apply plain error.

11 MR. STEWART: That's not --

12 JUSTICE SOTOMAYOR: Plain error is
13 required by the Rules of Federal Procedure. If
14 an objection has not been preserved, the court
15 has to determine whether the error was harmless
16 or -- or --

17 MR. STEWART: And I -- I'm sorry,
18 Justice Sotomayor.

19 JUSTICE SOTOMAYOR: -- well, that the
20 error was harmless.

21 MR. STEWART: May I -- may I respond
22 to that one, Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Yes.

24 MR. STEWART: I -- I come back to Ford
25 versus Georgia, where the Court affirmed that

1 state courts can adopt these timeliness rules.
2 Perforce, those rules are going to block some
3 claims, perhaps even some meritorious claims.
4 And given that signal, it was surely reasonable
5 to adopt this rule, which ultimately vindicates
6 and enforces Batson itself and makes for better
7 Batson rulings, as we --

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: General, I want to
12 take you back to the conversation that you and
13 I were having and that you were having with
14 Justice Kavanaugh, which is just this question
15 of waiver, because I do believe that, given the
16 Mississippi Supreme Court decision, that's the
17 only question before us.

18 The question is not whether this
19 defense counsel put enough in the record to
20 actually prevail on a Batson claim. The
21 question is instead whether the Mississippi
22 Supreme Court got it really wrong when it said
23 that she had waived her argument that there was
24 a Batson violation.

25 And, again, I'm just staring at this

1 transcript, and I guess, as to that question, I
2 don't really see the ambiguity in this
3 transcript because this is coming after the
4 fact of the prosecutor saying we had
5 race-neutral reasons for all of them, and she
6 says three times, I want to contest that. And
7 the court says over and over, it's in the
8 record, it's in the record, it's clear in the
9 record.

10 And when a court says that to you
11 three times, I actually don't believe that
12 it's, like, I'm not going to say what can you
13 do? I think she could have done more. I think
14 she could have said: Judge, really, like, I'm
15 not moving on to anything else until I get this
16 out.

17 But, on the other hand, it's hardly
18 ineffective assistance of counsel to make a
19 different kind of choice, to say: I don't want
20 to antagonize this judge. If he's insisting on
21 moving on, I better move on. That probably was
22 a wrong decision. I'll say that that
23 definitely was a wrong decision, but that's not
24 the question before us.

25 The question before us is only whether

1 she waived her objection. And how could she
2 possibly have waived her claim that there was a
3 Batson violation when she says it three times
4 and the court says three times it's in the
5 record, you've done it?

6 MR. STEWART: Okay. I appreciate
7 that, Justice Kagan. I'd -- I'd -- I'd make
8 two points. One is I really have to emphasize
9 it's not a holding that she waived the
10 objection or the claim. It's a holding that
11 she waived the pretext arguments, and that's a
12 critical difference.

13 JUSTICE KAGAN: It's a -- I'm saying
14 it's -- that what they said -- the pretext
15 argument is just a way of establishing a Batson
16 violation. So, if you keep on saying there's a
17 Batson violation here, then you're saying
18 there's something wrong with what the state has
19 told you about their race-neutral
20 justifications.

21 And if you tell me that she had to use
22 the word "pretext" in what she was saying, I'll
23 tell you that's not the standard.

24 MR. STEWART: And what I'm saying,
25 Your Honor, is that she had to give the judge a

1 chance to rule on the comparative juror
2 arguments that she later claimed were central
3 to her argument. She did none of that. She
4 didn't give the judge a chance to rule on it.

5 JUSTICE KAGAN: Okay. In terms of
6 giving people a chance, the judge had every --
7 the judge is the judge. The judge has every
8 chance in the world to rule on whatever she
9 wants to do. The judge could have said: You
10 know, okay, I'll put you to it. Show me what
11 you got. So you don't have to give the judge a
12 chance.

13 MR. STEWART: I mean, Judge, I -- I --
14 Justice Kagan, I think --

15 JUSTICE KAGAN: And the judge said
16 it's all in the record, it's all in the record,
17 it's clear.

18 MR. STEWART: No, respectfully, he --
19 he didn't say that, Justice Kagan. He -- he
20 agreed that the objection was in the record.
21 And all she said was, I want to reserve the
22 objection. And he said it's -- you know,
23 that's what he gave her a signal to.

24 What -- what I'd emphasize, Justice
25 Kagan, is, I mean, look --

1 JUSTICE KAGAN: You think that the
2 judge thought that -- that she was only
3 objecting in the same way she did at the very
4 start of the -- of the inquiry, that she was
5 just making, like, a prima facie case?

6 I mean, obviously, the judge did not
7 think that. The judge thought that she thought
8 that there was a Batson violation, and she
9 said -- and he said, enough, it's in the
10 record.

11 MR. STEWART: And -- and here's --
12 here's the key point, Justice Kagan. Whenever
13 my friend or any hypothetical needs to suggest
14 the judge cut her -- cut her off, it always has
15 to use words that are not in the transcript.
16 And she referred not to pretext, not to the
17 desire to make more arguments. She didn't say,
18 you know, Your Honor, I didn't make some
19 arguments that I would like to make, can I just
20 take a moment to preserve those?

21 And every indication of this record is
22 that he would have allowed her to. I mean, he
23 allowed her to make an extended argument
24 challenging death qualifications even though
25 she conceded it was doomed. I mean, she talked

1 about carpool routes and juror medical issues
2 and jurors being married to each other. When
3 she wanted to say something, she did.

4 And the judge heard her out and very
5 often ruled for her. In this part of the
6 transcript, just like when -- when the actual
7 Batson challenges in step 2 and step 3 were
8 occurring, she didn't say any of that and
9 didn't give any indication, and she still
10 didn't do so in her posttrial motions.

11 JUSTICE KAGAN: Thank you.

12 MR. STEWART: So I -- that's what I'd
13 emphasize, Your Honor.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: Briefly, I hope.

18 Should you lose, what is the
19 appropriate remedy? Let's say you lose on the
20 (d)(2), so there's an unreasonable
21 determination of fact. I know you're going to
22 want to fight the hypothetical, but please
23 don't.

24 MR. STEWART: Very good.

25 (Laughter.)

1 JUSTICE GORSUCH: Okay?

2 MR. STEWART: We --

3 JUSTICE GORSUCH: If this Court would
4 find there's an unreasonable determination of
5 fact, but under 2254(a), of course, we can only
6 grant a writ if we find a violation of the
7 Constitution. So there's obviously more work
8 to be done after we decide the waiver issue.

9 Can you explain how that's going to
10 proceed?

11 MR. STEWART: I mean, I think, number
12 one, there would need to be a showing of a
13 substantive, I think, Batson violation,
14 potentially, overcoming (e)(1), for example, in
15 district court. If this -- if -- if -- if this
16 Court or the lower courts were to think that
17 that -- that law and justice were -- were shown
18 in this case to warrant issuance of the writ, I
19 mean, I think it would go back to the state
20 courts. I mean, this -- this would depend if
21 the Court finds a substantive Batson violation,
22 I think --

23 JUSTICE GORSUCH: Well, no, we're
24 not -- we're likely -- assume we're not going
25 to make that inquiry, that we're going to

1 confine ourselves to what we spent the last two
2 hours talking about, which is the waiver issue,
3 okay, and we find an unreasonable determination
4 on the waiver issue.

5 What more does a federal court need to
6 do?

7 MR. STEWART: Got it. I mean, I -- I
8 think, as we've said in our papers, the
9 possible remedy in that case when it goes back
10 down the federal chain would be a writ that
11 would require release if the Mississippi
12 Supreme Court does not in a certain amount of
13 time undertake whatever analysis this Court
14 holds to be lacking. So, if that's do a new
15 step 3 analysis in light of the relevant
16 arguments, that would be the -- the measured
17 remedy there.

18 I think that would be consistent, for
19 example, with what's appeared when, say, habeas
20 is granted for -- on a question of whether a
21 confession was voluntary. You don't
22 necessarily need to do a retrial -- retrial.
23 You just need to see if the confession was
24 voluntary. If it is, things can stand. I
25 think similarly here, Justice Gorsuch.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: A couple things.
4 First, I agree with you that the court does not
5 need to do anything at the point in the
6 transcript we've been focused on, defense
7 counsel had said, I withdraw my Batson
8 objection or, having heard the asserted
9 reasons, I have nothing on pretext. So I agree
10 with you in that situation. But that's,
11 obviously, as we've explored, not what I -- it
12 looks like it happened here.

13 You -- you've said that she could have
14 jumped in again after that colloquy on 175
15 after she twice raises it, but, at the end of
16 that, the district court says, "The court finds
17 there to be no Batson violation."

18 Now, again, as Justice Kagan said,
19 could have jumped in, but at that point, he
20 said you've made the objections, you preserved
21 them, and there's no Batson violation. Right?

22 MR. STEWART: Agree with that framing
23 because, you know, again, made the objection,
24 Your Honor. I think that's the critical thing.

25 JUSTICE KAVANAUGH: Right. And then,

1 for why -- there are two possibilities for why
2 I think that it got truncated here, which we've
3 all explored. One is that the district -- the
4 trial judge had a misunderstanding of what
5 Batson required, didn't understand the third
6 step, and that's in that sentence that I read
7 before. Well, all the reasons were
8 race-neutral as to members and so there's no
9 Batson violation. Right? So that's one
10 possibility.

11 The other possibility, and Judge Mills
12 in the federal habeas district court alludes to
13 this, because Judge Mills applies AEDPA,
14 correct?

15 MR. STEWART: He says he does. I --

16 JUSTICE KAVANAUGH: Right.

17 MR. STEWART: -- I agree with that.

18 (Laughter.)

19 JUSTICE KAVANAUGH: Yeah. No, but
20 he -- he articulates the AEDPA framework. He's
21 a very experienced district judge, been a
22 Mississippi Supreme Court justice. He says
23 he's applying AEDPA unreasonable.

24 And what he says happens is it stopped
25 after two steps, simply put, no state court,

1 whether it be the majority in the Mississippi
2 Supreme Court or the trial court, conducted a
3 full three-step Batson inquiry.

4 And then he explains what he thinks
5 could have happened. He's generous to the
6 trial court on this, I think. The trial court,
7 seemingly eager to proceed in the case itself,
8 quickly deemed the races -- reasons as
9 race-neutral and moved on.

10 The trial court's actions, perhaps
11 understandable and relatable to this court --
12 speaking to Judge Mills, trying to show
13 empathy, I think, for the burdens on a trial
14 judge -- are error nonetheless.

15 So I think, you know, whether the
16 trial judge misunderstood the third step or the
17 trial judge was just, you know, rushing it
18 along to try to keep things moving or whatever,
19 it just never happened.

20 MR. STEWART: And --

21 JUSTICE KAVANAUGH: That's Judge
22 Mills, again, applying AEDPA or at least
23 articulating it, but I agree with Justice
24 Thomas completely. We have to look through
25 the -- the AEDPA standards here.

1 MR. STEWART: And -- and so I
2 appreciate that, Justice Kavanaugh. To -- to
3 take the -- the second bit first, I would come
4 back to Petitioner's own words where he
5 declared on direct appeal that the trial judge
6 did decide step 3. And this is surely a fair
7 reading of that record. That's page 484 of the
8 transcript. And he, again, links that to the
9 same parts of the transcript that we do in
10 Footnote 4 on page 484.

11 JUSTICE KAVANAUGH: Okay.

12 MR. STEWART: And I -- I -- I think
13 that's quite important. I think it shows that
14 it's not objectively unreasonable to find that
15 the trial judge did conduct step 3 here.

16 Could it have used better, more clear
17 words? I think, you know, of -- of course,
18 that's true, but what I think the judge was
19 really doing was he wanted to be clear. I am
20 finding these race-neutral in fact. I think
21 that is what he was doing. That is surely a
22 permissible view of the transcript.

23 And, therefore, on clear error and,
24 certainly, on AEDPA review, I think it is the
25 compelled view in this case.

1 JUSTICE KAVANAUGH: Last question.
2 Sorry to prolong it. Obviously, focused on
3 this, but the reason this matters is this is
4 a -- a death penalty case, right, and -- and he
5 was 17 when he committed the crime, and he did
6 not, not that this is good, but he was not the
7 shooter, correct?

8 MR. STEWART: That's right, Your
9 Honor. I mean, not the fatal shooter, that's
10 right.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: General Stewart, I
15 just want to understand your answer to Justice
16 Gorsuch on remedy. So, if we think that the
17 Mississippi Supreme Court was wrong on the
18 forfeiture/waiver point, I don't understand how
19 it gets back.

20 You said something about it getting,
21 you said this in your brief, something about it
22 getting back to the Mississippi courts.
23 Wouldn't the remedy be that we send it back
24 down below for then the federal courts to
25 analyze whether there was a Batson violation

1 based on the comparative juror evidence?

2 MR. STEWART: I mean --

3 JUSTICE BARRETT: I just don't see the
4 route of bouncing back. It's not direct
5 review.

6 MR. STEWART: Well, I -- I guess what
7 I'm -- so it would not be -- we didn't suggest
8 remand to state court straight from --

9 JUSTICE BARRETT: Yeah.

10 MR. STEWART: -- this Court,
11 certainly, Your Honor. I -- I think we're
12 responding to the suggestion that the writ
13 should issue here at all. I mean, my -- my
14 friend has maintained that the writ should flat
15 out issue ordering release or retrial.

16 And our view is that if a federal
17 district court is issuing the writ here, the
18 most it can do is an order that would correct
19 the actual violation, which, by hypothesis
20 here, is not conducting a full step 3 analysis.

21 And that could be something that is
22 resolved by the state courts and would
23 eliminate the constitutional amendment.

24 JUSTICE BARRETT: So you're saying the
25 district court shouldn't -- if -- if we sent it

1 back down -- I agree, we did not grant cert on
2 the Batson question, so that's not for us to
3 decide.

4 But, if we sent it back down, you
5 don't think that the district court, you know,
6 or -- or, frankly, the Fifth Circuit -- I mean,
7 he said that the court has what it needs in the
8 record to look at the comparative juror
9 analysis.

10 Why couldn't the federal courts make
11 the Batson determination themselves?

12 MR. STEWART: I think that would also
13 be an option. I mean, I think, if the -- if
14 you sent it back down to the Fifth Circuit and
15 said, hey, look, you know, you were wrong to
16 find waiver, I mean, I think it would have
17 everything it needs in the Fifth Circuit to
18 just flat out rule on the Batson violation.
19 As -- as we said, you obviously know the merits
20 of our position, Your Honor, on that one.

21 JUSTICE BARRETT: Yeah, of course.
22 Okay. Thank you.

23 MR. STEWART: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson, anything further?

1 Thank you, counsel.

2 MR. STEWART: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Ms. Ferguson.

4 ORAL ARGUMENT OF EMILY M. FERGUSON
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE RESPONDENTS

7 MS. FERGUSON: Mr. Chief Justice, and
8 may it please the Court:

9 State and federal appellate courts
10 routinely decline to consider claims, issues,
11 and arguments that were not preserved in the
12 trial court, consistent with historical
13 tradition. The Batson context is a
14 particularly important time to apply that rule.

15 Whether a Batson violation has
16 occurred is fundamentally a question of fact.
17 Requiring parties to preserve their arguments
18 that a prosecutor's stated reason is pretextual
19 ensures that trial courts can consider all of
20 the relevant information as they make the
21 factual determination whether discrimination
22 has occurred, and it allows prosecutors to
23 explain their strikes and decisions not to
24 strike when the reasons are top of mind.

25 Justice is better served when these

1 questions are aired before the jury is sworn,
2 when any errors can be fixed, rather than
3 through a cold record on appeal.

4 The Mississippi Supreme Court did not
5 unreasonably apply federal law or unreasonably
6 determine the facts when it determined that
7 Petitioner failed to preserve his Batson
8 pretext arguments in the trial court.

9 This Court should affirm.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Well, Ms. Ferguson,
12 would Petitioner have preserved this argument,
13 the Batson arguments, if he had been in federal
14 court?

15 MS. FERGUSON: No, Petitioner would
16 not have, I think, preserved the arguments.
17 The federal courts would apply plain error and
18 consider those arguments under that standard.

19 CHIEF JUSTICE ROBERTS: What do you do
20 with the points we've been talking about on
21 page 175, where the defense seems to be looking
22 down the road for something that's going to
23 happen, said at some point, I'm going to want
24 to reserve these questions.

25 And the judge does say: You know,

1 you've -- you've already made those, they're
2 clear in the record. In other words, his
3 response, the judge's response to I'd like to
4 reserve them is that you have.

5 MS. FERGUSON: Well, Mr. Chief
6 Justice, I think that that was likely a
7 demonstration by defense counsel that she
8 wanted to say more. And she, in fact, did say
9 more. And so that -- I'd like to respond to
10 something that was of significant discussion
11 during the state's argument, which is that
12 reference on JA 176 to the statistics.

13 And the fair cross-section requirement
14 applies to the venire, not to the selected
15 jury. So, when the defense counsel is
16 referring to the number of black jurors who are
17 on the selected jury, not on the venire, that
18 necessarily is an argument in support of the
19 Batson claim and -- and shouldn't be an
20 argument in support of the fair cross-section
21 claim because she's talking about the selected
22 jury.

23 And so I think the -- the suggestion
24 that that was only about the fair cross-section
25 claim and not about the Batson claim just

1 doesn't make a ton of sense. And I think it
2 shows that she was, in fact, given the
3 opportunity to raise additional Batson
4 arguments and she chose not to raise any --
5 any argument as to jurors.

6 CHIEF JUSTICE ROBERTS: So you're --
7 you're saying when she said, at some point, I'm
8 going to want to reserve this, that that was
9 the half page of the record later?

10 MS. FERGUSON: I -- I do think that
11 that's when she took the opportunity. And she
12 could have said, you know, if I may, Your
13 Honor, I have additional arguments to make.
14 She didn't do that either before she said I'm
15 going to want to make or after she said I'm
16 going to want to make.

17 JUSTICE SOTOMAYOR: In the federal
18 courts, they already have plain error review.
19 And counsel for the state tells us that the
20 state also has the discretion to consider a
21 plain error, correct?

22 MS. FERGUSON: That's right, Your
23 Honor.

24 JUSTICE SOTOMAYOR: All right. So if
25 the juror comparison is clear from the record

1 that there was a Batson error, that could be
2 reviewed and should be reviewed by the
3 Mississippi court. No?

4 MS. FERGUSON: Well, I think two
5 points on that. One is, you know, just the
6 existence of an error being plain is not
7 sufficient to make mandatory plain error
8 review. And so under state law, the state
9 court had discretion to consider that argument
10 or not, depending on the other prongs.

11 And the --

12 JUSTICE SOTOMAYOR: If the step 3
13 analysis was never done by the court. How
14 could it not be an abuse of discretion to fail
15 to have done -- done it by someone?

16 MS. FERGUSON: Well --

17 JUSTICE SOTOMAYOR: It's a judicial
18 obligation to do a step 3.

19 MS. FERGUSON: It is a judicial
20 obligation for the court to engage in step 3,
21 but I don't think it's an accurate depiction of
22 the record to say that the trial court here did
23 not make a step 3 finding.

24 JUSTICE SOTOMAYOR: I -- I know.
25 We're going back and forth on that point.

1 MS. FERGUSON: And I -- I'd add one
2 more response on that --

3 JUSTICE SOTOMAYOR: Thank you, counsel
4 -- oh, go ahead.

5 MS. FERGUSON: I would add one more
6 response on that as to existence of a step 3
7 finding here, and that's on -- in this Court's
8 decision in Purkett, the Court said that the
9 state court had found at step 3 that the
10 prosecutor was not motivated by discriminatory
11 intent. And the -- the way the Court describes
12 the facts in that case is that the state trial
13 court, without explanation, overruled
14 Respondent's objection and empaneled the jury.

15 So we think that's very similar to
16 what happened here. And the Court found that
17 there was, in fact, a step 3 finding even
18 though there was no explicit "I find the
19 prosecutor's stated reasons to be credible."

20 JUSTICE KAVANAUGH: How could there be
21 a step 3 finding if usually that's evaluating
22 whether the race-neutral reason is the true
23 reason or whether instead it was pretext? If
24 there had a has been no argument that it has
25 been pretext, how could there be a step 3

1 analysis? That's point 1.

2 And, point 2, Judge Mills, who
3 evaluated this, the federal habeas court,
4 flat-out said multiple times it ended at step
5 2.

6 MS. FERGUSON: Well, Your Honor, I
7 don't think that Judge Mills was -- was right
8 to say that it ended at step 2. And I -- I
9 know you pointed out earlier the state court's
10 line that all the reasons were race-neutral.

11 I think that saying all the reasons
12 were race-neutral, to Justice Alito's point,
13 demonstrates that the trial court at least
14 implicitly had found those to be the actual
15 reasons.

16 You don't have a situation where the
17 trial court said the prosecutor stated
18 race-neutral reasons, and so we find there to
19 be no Batson violation. That would look like a
20 state court that was misunderstanding what
21 Batson requires at step 3, if the -- if the
22 state court said that only stating race-neutral
23 reasons was sufficient.

24 But here you had the -- the state
25 court say all of the reasons were race-neutral.

1 And I think that's enough, particularly given
2 what this Court found in Purkett, to show that
3 there was an implicit credibility finding
4 there.

5 JUSTICE JACKSON: What -- what about
6 the court saying all of the reasons were
7 race-neutral and so the court finds there to be
8 no Batson violation?

9 MS. FERGUSON: Justice Jackson, I
10 think the answer is the same, and that's
11 because, again, if the reasons are
12 race-neutral, that implies that those are the
13 actual reasons. And that's distinct from
14 saying the prosecutor has stated --

15 JUSTICE JACKSON: Isn't that
16 collapsing 2 and 3? I mean, 2 is race-neutral
17 reasons; 3 is are they pretextual. And we've
18 said you aren't supposed to collapse those two.
19 So your argument just did so by saying if you
20 have 2, then you've satisfied 3.

21 MS. FERGUSON: Justice Jackson, no, I
22 don't think that that's our --

23 JUSTICE JACKSON: Didn't you just say
24 if they're race-neutral, that means they are
25 the real reasons?

1 MS. FERGUSON: I -- I think the actual
2 reasons are race-neutral, so not whether the
3 stated reasons are race-neutral. If the
4 prosecutor has merely stated race-neutral
5 reasons and the trial court doesn't credit
6 those, those reasons, or if there's any reason
7 to believe that those are not the real reasons
8 that the prosecutor exercised the strikes, then
9 you can go --

10 JUSTICE JACKSON: Isn't there also a
11 more complex way of looking at this that
12 Miller-El brings up, which is not reason by
13 reason but sort of the -- the comparison,
14 right? There's no indication here that this
15 court did any sort of comparative work, which
16 would have been what we would have expected
17 from the district -- I mean from the defense
18 counsel if given an opportunity, correct?

19 MS. FERGUSON: I think certainly
20 you -- given what the -- what defense argued on
21 appeal, you would have expected that.

22 JUSTICE JACKSON: Right. So if -- if
23 the comparison is also a part of the
24 determination of pretext, how does this record
25 indicate that the court did any of that kind of

1 analysis?

2 MS. FERGUSON: Well, I don't think
3 there's any particular indication that the
4 court was sua sponte considering arguments that
5 weren't raised, but I think that when it comes
6 down to the ultimate question this Court has
7 explained several times, the ultimate question
8 is whether the prosecutor or the -- the
9 striking party was engaged in intentional
10 discrimination.

11 And, necessarily, if the judge finds
12 that the reasons were race-neutral, then
13 race-neutral reasons, in fact, being exercised
14 is incompatible with a finding of intentional
15 discrimination.

16 JUSTICE JACKSON: Can I ask you a
17 broader question? And then I'm done. The
18 United States has entered this case as an
19 amicus curiae, meaning that you did not have to
20 be here. And as Justice Kavanaugh pointed out,
21 this case is a capital case involving the
22 conviction of a defendant who was not the
23 shooter, a felony murder scenario.

24 And so I guess I'm trying to
25 understand the United States' interest. Your

1 -- your -- your brief doesn't really pay a lot
2 of attention or devote a lot of time to
3 defending the actual conviction. So what --
4 what is the principle that you are seeking to
5 have upheld in this case in which it's clear
6 that the defense counsel said several times I
7 have a Batson objection and tried to preserve
8 it, and the court, if anything, misled her into
9 believing that she had preserved it by saying
10 it's in the record? Why is the United States
11 interested in being involved in this case?

12 MS. FERGUSON: Well, Your Honor, the
13 United States is a party in many trials,
14 including many criminals trials, and is
15 subjected to Batson objections and defense in
16 Batson cases. And so I think our interest is
17 in defending the right of courts of appeals to
18 exercise their discretion to consider juror
19 comparison arguments and -- and not as, I
20 think, Petitioner, if I may, Your Honor --

21 CHIEF JUSTICE ROBERTS: Sure.

22 MS. FERGUSON: Not as Petitioner
23 argued in Petitioner's brief, although it
24 seemed to -- to walk away from today, adopt a
25 rule that appellate courts must consider juror

1 comparison arguments when they are raised for
2 the first time on appeal.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: Ms. Ferguson, I -- I
10 want to go back to what you were saying before,
11 and I'll -- I'll grant you something. I'm
12 going to assume your view, that the judge here
13 did not collapse stage 2 and stage 3 and the
14 judge understood what he was doing and that the
15 judge made a determination that there was no
16 Batson violation, the determination that you
17 would make at the end of the day. All right?

18 In exchange for my assuming your view
19 on that, I need you to assume my view on
20 something else, which is that the defense
21 counsel understood that that's the stage that
22 they were in; in other words, that now they
23 were talking about the ultimate Batson
24 violation, and what she was objecting to was
25 the finding of the ultimate Batson violation.

1 So let's say that they were both on
2 the same page. We understand that we're
3 contesting the ultimate Batson violation. So
4 if you assume those two things the court says
5 there was no violation, and the defense counsel
6 says I object to that, I think there was a
7 Batson violation, and he said I got that, I
8 understand that, it's preserved, and she says I
9 want to make an argument about this, and he
10 says it's preserved, it's preserved -- how
11 could it not be preserved?

12 MS. FERGUSON: Well, Your Honor, I
13 would -- I agree with the state that there's a
14 distinction between observing -- preserving a
15 claim and preserving particular arguments. And
16 simply saying I disagree with the ultimate
17 finding is not sufficient to preserve every
18 possible pretext argument under the sun.

19 And so I think there needed to be some
20 form of even gesturing at juror comparisons.
21 There was nothing in the record at all until
22 after trial to suggest that Petitioner's
23 counsel thought that there was a problem with
24 white jurors not being struck who shared
25 characteristics with the black jurors who were

1 struck.

2 JUSTICE KAGAN: So you think in the --
3 in the face of the court saying, again and
4 again, it's in the record, I got it, it's
5 preserved, she has to make clear what the
6 particulars of her view is, why exactly there
7 is a Batson violation?

8 MS. FERGUSON: In order to -- to
9 preserve those particular pretext arguments for
10 appeal, yes, under Mississippi law.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 JUSTICE GORSUCH: In fact, a lot of
15 courts have issue preservation rules with
16 respect to arguments, not just claims or
17 issues.

18 MS. FERGUSON: That's correct, Your
19 Honor.

20 JUSTICE GORSUCH: And we've never held
21 those impermissible before?

22 MS. FERGUSON: No, Your Honor, and in
23 fact, this Court has repeatedly reaffirmed both
24 -- in the context of Batson claims in state
25 courts, in Batson and in Ford versus Georgia,

1 the Court has reaffirmed that procedural rules
2 are permissible. And then in Singleton versus
3 Wulff, this Court affirmed that courts of
4 appeals in the federal system have discretion
5 over when to accept unpreserved arguments on
6 appeal.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 Justice Barrett?

10 JUSTICE BARRETT: Just one question,
11 Ms. Ferguson.

12 Is it unusual for the United States to
13 appear as an amicus when we have a
14 constitutional question before us that affects
15 the United States in litigation?

16 MS. FERGUSON: No, Your Honor. It's
17 quite common for us to appear.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 Thank you, counsel. Rebuttal,
22 Mr. Perkovich.

23 REBUTTAL ARGUMENT OF JOSEPH J. PERKOVICH
24 ON BEHALF OF THE PETITIONER

25 MR. PERKOVICH: Just a few quick

1 points. First I wanted to address the -- the
2 issue with may not in the Woodward case that
3 constrained on direct review the inquiry. And
4 that's simply the point. At that gateway
5 issue, there was an understanding that they
6 clearly may and this Court has done so
7 routinely. So that's our fundamental point on
8 that.

9 With respect to the procedural sort of
10 rules that Ford versus Georgia endorse as a
11 basic principle, we have no qualm with that.
12 That is a timely objection rule. Of course
13 that's not applicable here.

14 And -- and with respect to a waiver
15 rule and forfeiture, however it's framed, the
16 problem is that it's not implementing Batson in
17 step 3. It's obstructing Batson in step 3.
18 And that's the work that's occurring in this
19 case and the problem with that rule.

20 With respect to the conflation of
21 race-neutral findings and step 3, there is a
22 very big step between determining something is
23 race-neutral and determining it is credible.

24 And that's where the work of the court
25 at a minimum, the trial judge, is required,

1 whatever is being pressed by the opponent of
2 the strike for the reasons I've pointed to and
3 are spoken to forcefully in Powers with regard
4 to the other stakeholders and the broader
5 stakes for our society, with regard to the
6 Equal Protection Clause in this context.

7 With regard to remedy, Batson, of
8 course, ushered in a prohibition of the
9 discriminatory use of strikes in a way that
10 improved upon Swain and provided a specific
11 framework.

12 And so when that framework breaks
13 down, as it did here, that's a structural
14 error. And so this has to return to its prior
15 posture, much the way the last time this Court
16 found a (d)(2) violation in Miller-El, which is
17 to the district court and for a judgment
18 entered for the Petitioner.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 12:17 p.m., the case
22 was submitted.)

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25

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