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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Washington, D.C.

Tuesday, March 31, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:27 a.m.

APPEARANCES:

JOSEPH J. PERKOVICH, ESQUIRE, New York, New York;
appointed by the Court, on behalf of the
Petitioner.

SCOTT G. STEWART, Solicitor General, Jackson,
Mississippi; on behalf of the Respondents.

EMILY M. FERGUSON, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; for the
United States, as amicus curiae, supporting the
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

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

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

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

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

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

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

I welcome the Court's questions.

JUSTICE THOMAS: Did trial counsel make those arguments?

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

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

MR. PERKOVICH: Trial counsel --

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

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

JUSTICE THOMAS: What was the

objection?

MR. PERKOVICH: It was a Batson objection.

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

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

JUSTICE THOMAS: So did trial counsel do that?

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

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

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

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

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

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

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

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

Fourteenth Amendment racial discrimination.

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

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

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

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

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

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

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

asking the court for the opportunity to do so?

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

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

MR. PERKOVICH: Yes, Justice --

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

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

Batson inquiry holds, which is three steps.

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

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

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

JUSTICE KAVANAUGH: Well, after the --

JUSTICE BARRETT: But, I guess --

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

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

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

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

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

MR. PERKOVICH: That's right, Justice Kavanaugh. And -- and of course, you know, that addresses the (d)(2) considerations in the case, and their legal implications as well in terms of the mishandling of this, but reading that record and determining whether this is a reasonable determination that this defense counsel on this transcript had forfeited or -- or failed to rebut when her effort to be heard on the matter was clearly addressed and -- and

so her --

JUSTICE SOTOMAYOR: Counsel --

MR. PERKOVICH: Yes, Your Honor.

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

MR. PERKOVICH: Yes.

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

MR. PERKOVICH: Yes.

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

MR. PERKOVICH: Justice Sotomayor, that's right. And that's very salient because that is, on this record, the first opportunity meaningfully to speak to the pretext question and comparisons issue, which he did --

JUSTICE SOTOMAYOR: Once the -- once the judge decided to empanel the jury, the only time really to raise it again was on posttrial motions.

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

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

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

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

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

MR. PERKOVICH: Right.

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

What do you think the judge should have done?

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

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

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

opportunity to impeach that reason essentially. Right?

MR. PERKOVICH: Respectfully, no, Your Honor.

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

MR. PERKOVICH: Yes, Your Honor.

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

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

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

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

JUSTICE BARRETT: Some overlap?

MR. PERKOVICH: -- of the general

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

JUSTICE BARRETT: A discrete challenge.

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

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

MR. PERKOVICH: Right.

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

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

MR. PERKOVICH: Justice Barrett, there's sort of two junctures here within five, six pages of the JA that are important. The

first are, after the race-neutral determinations are made, the court then immediately instructs the -- the defense to start striking the jury with the panel that's in the box.

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

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

MR. PERKOVICH: Yes, Justice Barrett. In a situation where you have four strikes that are being addressed in succession and the court elects to deal with the step 2 all in a row, it would be reasonable and certainly kind of the

only way to -- to encounter what's transpiring in that back-and-forth between the prosecutor and the judge to expect that step 3 will occur after that.

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

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

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

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

JUSTICE BARRETT: So you're --

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

JUSTICE SOTOMAYOR: Counsel, I -- I

think --

JUSTICE ALITO: Mr. Perkovich --

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

MR. PERKOVICH: Yes.

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

MR. PERKOVICH: Yes.

JUSTICE SOTOMAYOR: And --

JUSTICE BARRETT: To clarify, though, I -- I agree with that. I was just talking about the argument about the comparative jury.

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

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

MR. PERKOVICH: Right.

JUSTICE SOTOMAYOR: And she says: I think the jurisprudence simply states the court must make a determination on the basis of all the relevant circumstances to racial discrimination.

The judge then says: I'll have the state give race-neutral reasons. And after each race-neutral reason is given, he then asks for the next one and the next one and the next one. And I think your point is he never pauses to give her a chance to address pretext, correct?

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

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

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

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

like this.

MR. PERKOVICH: Justice Alito, when -- if you could clarify that question of -- of defense counsel's general behavior.

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

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

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

well, anyway, I don't understand it.

MR. PERKOVICH: Well, Justice Alito, I think the fact that this is sort of a two-person conversation very clearly from the record and that these strikes were clustered reflected what was going on in that courtroom with the judge just addressing the steps in succession. I think the reasonable expectation is that defense was going to be heard, and that -- and that third step just did not happen. Rather, the court instructed her to strike her panel. And she returned to this once -- once there was that opportunity that we've already discussed.

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

MR. PERKOVICH: Yes.

JUSTICE ALITO: The judge should have said, okay, that's -- that's your reason; defense counsel, what -- what do you have to say, if anything? You know, that's what should have been done. But, really, she had every

opportunity to make her point and she didn't. It's not -- it's not a case where the judge said, shut up, sit down, I'm going to hold you in contempt if you say anything more.

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

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

JUSTICE GORSUCH: Counsel, I appreciate all of that, and I -- I -- I

understand this was not a model by anybody's stretch of imagination. But I -- I didn't see where the defense counsel even mentioned the word "pretext" to the court anywhere in the transcript until after trial.

MR. PERKOVICH: Right.

JUSTICE GORSUCH: And given that, could somebody read this as saying I don't have a pretext argument, you know? I mean -- and one -- Ms. -- colleagues emphasized we're under (d)(2), so we're not asking did she waive; we're asking whether the Mississippi Supreme Court could reasonably -- any reasonable jurist could reasonably conclude that she waived the argument by not mentioning even the word. How do I get -- help me with that.

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

So before that is -- is a finding, a determination from the supreme court that there was a -- a -- a failure to rebut. And -- and, again, the effort is to be heard. The response from the court is this is clear in the record.

And then the line's drawn under Batson and a shift is to the other issues.

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

Now the (d)(2) point is -- is critical here, but also, there -- there is a (d)(1) implication in this breakdown and -- because --

JUSTICE GORSUCH: Well, help me with the (d)(2) because that's what I'm struggling with at the moment.

MR. PERKOVICH: Okay.

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

MR. PERKOVICH: Well, Justice Gorsuch, if I may, so there is a burden of persuasion

that -- that sticks with the challenger, the opponent of the strike, and that's the defendant. There's also a duty that the court has.

JUSTICE GORSUCH: I -- I appreciate --

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

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

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

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

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

JUSTICE GORSUCH: Really?

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

JUSTICE GORSUCH: You don't -- if -- if -- if -- if the plaintiff says -- sorry, the

defense lawyer says, I -- I don't have a pretext argument, Your Honor?

MR. PERKOVICH: Well, that would be --

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

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

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

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

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

MR. PERKOVICH: Mm-hmm.

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

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

JUSTICE GORSUCH: Sure, to say no

Batson violation basically.

MR. PERKOVICH: To -- to --

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

MR. PERKOVICH: That is -- yes.

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

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

MR. PERKOVICH: That's right.

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

JUSTICE GORSUCH: To -- to be clear, I appreciate all of that. And I appreciate that the court has to make a determination. But the

court here did make a Batson determination. He said: I find no violation.

Now maybe that's wrong, okay?

MR. PERKOVICH: Well --

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

MR. PERKOVICH: Well, Justice --

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

MR. PERKOVICH: Well --

JUSTICE GORSUCH: And help me with the (d) -- help me with the (d)(2) thing. I really want some help on that.

MR. PERKOVICH: I'm trying, Justice Gorsuch, but -- but the -- the -- the key thing here is that his understanding from this record is of two steps. In other words, the equation is race-neutral equals no Batson violation. It completely elides the duty he has to do two things, right? Once the case shifts to step 3, the court has to afford an opportunity for the

ultimate burden of persuasion to be met and make a determination, whatever is said in pressing that burden of persuasion.

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

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

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

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

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

before the court.

JUSTICE THOMAS: So what is before the court, there's -- you've got the initial assertion. You've got the race-neutral from the prosecutor. And you have a -- a defense counsel who says, I have nothing.

So what else is there?

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

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

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

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

MR. PERKOVICH: I'm sorry.

(Laughter.)

JUSTICE THOMAS: The -- you used Miller-El as your model, but didn't the defense counsel there challenge the race-neutral assertions?

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

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

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

JUSTICE THOMAS: Yes.

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

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

MR. PERKOVICH: Well, no more than was done here, Your Honor. The challenge --

there's no question that the Batson challenge for the four strikes in question here was timely, never waive -- never withdrawn.

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

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

JUSTICE THOMAS: And how many?

MR. PERKOVICH: I believe it was 11.

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

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

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

MR. PERKOVICH: Seven.

JUSTICE THOMAS: And how many -- what

was the racial breakdown?

MR. PERKOVICH: Three to four.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

So seems legitimate on its face. Now maybe it's not, but -- and so then the trial judge turns to defense counsel and says: Defense counsel, anything to say? And defense

counsel says: Nothing to say.

MR. PERKOVICH: Well -- well --

JUSTICE ALITO: Now what -- what about there? Is that an -- and then the judge goes on. Is -- is that a Batson violation?

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

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

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

MR. PERKOVICH: And --

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

MR. PERKOVICH: Yes, Your Honor.

JUSTICE ALITO: -- during voir dire?

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

MR. PERKOVICH: Justice Alito, there --

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

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

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

JUSTICE ALITO: Well, I -- okay, I -- I understand. But your -- your -- your argument is that even in the example that I gave you where the -- the judge says: Defense counsel, do you have anything to say about this? And defense counsel says: No, nothing to say. That that is not -- that there could still be a violation there?

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

JUSTICE ALITO: Okay.

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

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

MR. PERKOVICH: Well, if there's a pause and nothing is said, then that's a different record from what we have. To return to the -- the -- sort of these

legitimate-seeming race-neutral reasons, again, the disinterest in questioning on any of the reasons that are offered there is -- has been repeatedly recognized by this Court as denoting a sham. In -- in fact, that's language in -- in Miller-El and Snyder as well.

And so, you know, it's not that that's not a in principle legitimate reason. It's that it's not explored because often, when it is explored, what comes to light in that process is that the family member really has no connection to the situation and it's not disquieting for the prosecution and -- and they don't -- wouldn't use it as a -- as a reason.

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

MR. PERKOVICH: Well, no.

JUSTICE ALITO: That's all that was required.

MR. PERKOVICH: Justice Alito, I'm referring to the duty that the court has. Whatever is advanced in -- in terms of the

burden of persuasion that the opponent has, the court still has to be aware of what has transpired in his courtroom and what has come forward in voir dire, what has not come forward in voir dire in terms of questioning via relevance of the proffers to the case, the absence of record basis.

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

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

to have the defense -- the police captain come here and question --

MR. PERKOVICH: Well --

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

MR. PERKOVICH: Justice --

JUSTICE ALITO: Is that what you're saying?

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

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

MR. PERKOVICH: No, Justice Alito, as I've been trying to advance, there still is

this duty for the court to consider all the circumstances bearing on racial animosity in this record and to make an assessment, whatever is advanced here.

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

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

MR. PERKOVICH: Okay.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

MR. PERKOVICH: None.

JUSTICE SOTOMAYOR: No pause between the four jurors and the race-neutral reason. So there's no chance for the defense attorney to say anything, correct?

MR. PERKOVICH: That's right.

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

MR. PERKOVICH: That's right.

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

MR. PERKOVICH: Right.

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

MR. PERKOVICH: That's right, Justice

Sotomayor. As -- as I pointed out earlier, the -- the proffers were not questioned. So the only questioning that this prosecutor did of consequence was to do death qualification, which resulted in the decimation of the black venire. So you have a concentration of questioning, JA 95 to 104, where, in rapid succession, he's questioning, I think, 37 different venire members, 28 of them black, to elicit responses that lead to cause strikes.

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

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

MR. PERKOVICH: Exactly.

JUSTICE SOTOMAYOR: -- in asking questions.

Now, going to the question that -- at no point did the justice say -- did the lawyer -- the judge here say, I'm doing step 3

in any way, that these were not pretext or that the -- that I find them to be both race-neutral and not race-based, correct?

MR. PERKOVICH: That's correct.

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

MR. PERKOVICH: Mm-hmm.

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

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

MR. PERKOVICH: Yes, Justice Sotomayor.

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

MR. PERKOVICH: I don't --

JUSTICE SOTOMAYOR: -- under step 3.

MR. PERKOVICH: Yes. I don't see how you can read that and -- and take away the suggestion of anything more than a determination of race neutrality. And, as I've tried to emphasize, there is a very big difference between race-neutral and credible. And that court has to make a credibility finding no matter what else happens in that courtroom.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

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

MR. PERKOVICH: Yes. Yes.

JUSTICE KAVANAUGH: But what happened here, I gather, your position is, and what Judge Mills, the district judge in the habeas case, found was, you know, Judge Mills said

"perhaps Pitchford's counsel should have been more assertive, but the court will not fault them for failing to present specific arguments on pretext when the trial court appeared to have been resolute in its brusque determination that no violation had occurred."

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

MR. PERKOVICH: Yes, Justice Kavanaugh. So what we have is trial counsel is seeking to be heard, right, before it's too late, as the venire is being dismissed, exiting the courtroom. The jury's about to be empaneled. That's when she's seeking to be heard, and she's rebuffed three times by -- it's in the record. It's -- it's clear in the record there is no Batson violation and

let's -- let's turn to the other issues, the fair cross-section issue.

So she's striving to be heard, and then, ultimately, she's reasonably relying on the court saying it's in the record. And this is in the context where she raises Miller-El, which had been decided about six months before this trial, wherein, clearly, the ability to press a case on appellate review was the letter of the day. So she's relying on what the trial court is saying, that this issue's over and the trial is moving forward and opening argument is going to happen in a moment.

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

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

authorities supporting that.

And she sought to be heard before it was too late. And then, at the next moment, as Justice Sotomayor pointed out, where she could address these issues in the motion for new trial, that was done, adequately so. It was fit for purpose in terms of the motion for new trial.

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

where --

JUSTICE BARRETT: So you are asking us to say something different? Or -- or do you agree that states have the right to come up with rules of forfeiture even for Batson objections?

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

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

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

MR. PERKOVICH: Justice Barrett, the last formulation you gave I would agree with, certainly.

JUSTICE BARRETT: You would agree with that. Great.

MR. PERKOVICH: The very last formulation, though.

JUSTICE BARRETT: Okay. Thanks.

MR. PERKOVICH: You're welcome.

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

MR. PERKOVICH: Well, I think the first point here is that the understanding of

its own law for Batson was that it could not, right, and -- and that it was unable to consider arguments pressed for the first time on appeal, especially in a context where the first opportunity to do that was on appeal. That's a problem.

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

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

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

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

MR. PERKOVICH: I'll -- Justice Barrett, I'll pick discretion, with the caveat,

though, that the language of this Court is a must, right? If we look --

JUSTICE BARRETT: So is it obligation or discretion?

(Laughter.)

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

MR. PERKOVICH: Right.

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

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

JUSTICE BARRETT: Okay, okay. So do you think we have what we need if we were to

conduct that comparative analysis now to find a Batson violation now?

MR. PERKOVICH: I think, unfortunately, that was the ball game for the state supreme court, and -- and, there, they elected not to do that. They had -- in that fork in the road, they could have taken what was submitted on appeal and make a merits decision or remand it.

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

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

JUSTICE BARRETT: But is it your position that that comparative juror analysis is sufficient, that it was there and the

Mississippi Supreme Court had what it needed to find a Batson violation based on what you had?

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

So, to the extent that people have

asked what was supposed to happen here, I suppose, if we're in a world that Justice Thomas posits, if the defense counsel, when we get to step 3, the trial court says: Counsel, and defense counsel says: Your Honor, I have no argument on pretext, well, first of all, you would, I think, expect the court to say: So are you withdrawing your Batson objection, counsel? I mean, Justice Kavanaugh says, well, that's sort of implicit, but I think the court, because it has a duty to resolve the objection, has to be clear about whether this thing is still on the table once counsel affirmatively says, I don't have any pretext evidence.

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

MR. PERKOVICH: Yes.

JUSTICE JACKSON: I mean, in -- in -- in -- in -- you -- you would expect the court

to say something like: Hearing no evidence or argument related to pretext and seeing no basis in this record for determining that the prosecutor's race-neutral reasons were pretextual, I find that there is no race discrimination or whatnot, right?

Like, the court has to make a finding --

MR. PERKOVICH: Yeah.

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

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

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

MR. PERKOVICH: Yes, Justice Jackson. Again, counsel has a duty to press the case and the ultimate duty or -- or burden of

persuasion, but that's simultaneous with the duty that by the time this gets to step 3 in the burden framework, it remains with the court to do the things that you've outlined.

JUSTICE JACKSON: And the court can say there's not evidence that there's discrimination here.

MR. PERKOVICH: Yes.

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

Let me just ask you another final question. I -- I see this also as possibly a very short opinion when we look at what Mississippi's Supreme Court said. It would go something like Pitchford's trial counsel made a Batson objection and reraised it multiple times. Each time, the trial judge reassured her that it was preserved. Nevertheless, Mississippi Supreme Court said it was waived.

That's unreasonable. The end.

What would be wrong with that?

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

(Laughter.)

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

With respect to (d)(1), you know, another way to look at this is this is a case that -- that, you know, I don't think this Court has seen where it just sort of falls off the ledge at step 2. And so that's a (d)(1) failing categorically. There's just an absence of that step being taken for the reasons you've outlined.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart?

ORAL ARGUMENT OF SCOTT G. STEWART

ON BEHALF OF THE RESPONDENTS

MR. STEWART: Mr. Chief Justice, and

may it please the Court:

In Flowers versus Mississippi, this Court faced an extraordinary case and ruled against the state. This case is also extraordinary but in a very different way that requires a very different result. Start with the facts in (d)(2).

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

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

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

Now take the law. In Ford versus

Georgia, this Court ruled that lower courts can adopt timely preservation rules to implement Batson. Many courts have done that and adopted a waiver rule like the one applied here. Petitioner ignores Ford -- Ford versus Georgia, he never cites it once, and he asks this Court to declare that a rule adopted by most federal courts of appeals is not just wrong but objectively unreasonable. That is extraordinary.

Petitioner also claims that the state trial judge failed to conduct step 3 of Batson. That was the core of his presentation this morning. That defies what the trial judge said, and it once against defies what Petitioner has said.

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

As I said when I began, this case is

extraordinary. Petitioner has conceded all that is central to his claim. Never has this Court granted relief under AEDPA when a habeas petitioner has so decisively doomed his own case. This case should not be the first.

I welcome the Court's questions.

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

What's your reaction to that?

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

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

MR. STEWART: I think Miller-El requires really no more than, on federal habeas review, state courts cannot make factual rulings that are objectively unreasonable. That's all Miller-El decided. It didn't reach the validity of a state procedural rule. It didn't rely or -- or cite or overrule or even touch Ford versus Georgia. It didn't reach any of those things at all.

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

MR. STEWART: I think it would have been quite easy, Justice Thomas. I mean, he could have said for -- for each of these challenges it would have just been two or three sentences, perhaps for Mr. Tillman, just one sentence. I mean, for Ms. Lee, who -- who was late, he could have said, Your Honor, I mean, other jurors were -- were late, you just refused to strike her for cause, and there's no evidence of mental problems that should be explored. That would have preserved and unlocked the panoply of arguments that he later

made about her in comparisons on appeal. He could have easily done that.

JUSTICE JACKSON: But didn't the court say it was preserved? I mean, she was obviously saying, I would like to make my record with respect to the Batson observations. As the Chief Justice points out, she says, at some point, I would like to do that.

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

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

JUSTICE JACKSON: You mean --

MR. STEWART: -- Jackson.

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

MR. STEWART: Oh, yes. Of course.

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

MR. STEWART: Sure. She just had -- she had to do something in rebuttal.

JUSTICE JACKSON: But -- but, when she went to do that, when she -- when she tried to do that, she said, at some point, I'd like to do that, and the court said, you've already done it. So whose mistake is that?

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

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

MR. STEWART: Right.

JUSTICE KAVANAUGH: She's trying to make the objections right there, and he says, you already made them and there's no Batson violation, and he makes a legal error in the course of that by saying, because they're race-neutral, there's no Batson violation, which, of course, is not the correct inquiry, I think you would -- you would acknowledge.

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

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

He read the record entirely differently than you did, and he pointed to this -- this -- this part right here where she's trying, I think -- we weren't there; we don't have an audio recording -- to -- to make the objections, and -- and the court says, "you already made those," they're clear, and "the

court finds there to be no Batson violation."

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

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

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

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

JUSTICE KAVANAUGH: I don't know. He says there's no Batson violation per se. I don't know. I mean, that's where Judge Mills says perhaps she could have been more assertive. And I take that point, and that's

why this is hard.

MR. STEWART: Well, I think -- and this would get back to, I think, you know, you -- you, I think, framed it correctly earlier, Justice Kavanaugh, where you said, you know, look, is it objectively unreasonable, is (d)(2) met?

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

I'd close the point by noting at page 176 that the judge then did allow her to state

the composition of the jury, her assertions about the composition of the county. And, you know, so she -- she had an opportunity to add more, and that's all she added, was bare numbers.

Then we look at the posttrial motion. Even when she had days and days, all she came up with -- and this was belatedly -- was the amended motion for a new trial, belatedly comes up with one sentence that points the judge to nothing about these comparisons.

JUSTICE KAVANAUGH: Well, that's --

JUSTICE KAGAN: But, General --

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

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

So you're right, General, she should have said a lot more stuff. She should have

been more assertive. But the only question before us is, did she waive her objection when, three times, she's told by the court, your objection is in the record, I hear you.

MR. STEWART: And -- and this is critical, Justice Kagan. The Mississippi Supreme Court did not hold that her objection was waived. It held that her pretext arguments were waived. It up -- it upheld the finding on that --

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

(Laughter.)

MR. STEWART: It's -- it's -- Justice Graves in dissent --

JUSTICE KAGAN: I'm sorry, General Stewart.

MR. STEWART: My apologies, Justice Kagan.

JUSTICE KAGAN: Here we are after the prosecutor has done all his here's my race-neutral reason, here's my race-neutral reason, and then the defense counsel says: I'm not persuaded, I need to -- I -- you know, I need to say something about this, I still have

an objection. Well, at that point, of course, she's objecting to the ultimate finding.

MR. STEWART: I mean, she's object --

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

MR. STEWART: Oh -- Oh, I agree --

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

MR. STEWART: But --

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

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

JUSTICE KAGAN: I think you're arguing

this on the merits. I think you're saying she didn't say enough to allow the court to find for her. But that's not the question before us. The question before us is whether the supreme -- the state supreme court was right when it said she waived her argument. She might not have presented a good argument, but she didn't waive her argument.

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

Justice Graves in dissent, my friend -- my friend in his federal habeas petition, agreed that the Mississippi Supreme Court resolved the claim on the merits. It held that the Batson pretext arguments, the comparative juror arguments that she had never made to the trial judge, that's what she waived. That's what she failed to --

JUSTICE KAVANAUGH: Well, can I just follow up on Justice Kagan's questions. After

the prosecutor gives the asserted race-neutral reasons, what else could she be objecting to than that those were pretextual?

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

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

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

JUSTICE KAVANAUGH: Exactly.

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

JUSTICE KAVANAUGH: What else that's after the asserted -- just answer my question -- after the prosecutor has given the asserted race-neutral reasons and she goes back to Batson, at that point, what else could she be objecting to other than that the asserted

reasons were pretextual?

MR. STEWART: I mean, I think it's the ultimate conclusion the district judge reached or -- pardon me -- the trial judge reached, that they were -- that they were race-neutral, in fact, and she hadn't shown discrimination. I mean, I think that --- that's why I think she -- she uses the word "reserve." And I think she wants to make sure -- I mean, that's -- that's the 175. She says, I'd like to reserve my --

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

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

MR. STEWART: Yes, Your Honor.

JUSTICE KAVANAUGH: The court says, the trial court, "all the reasons were

race-neutral as to members that were struck by the district attorney's office, and so the court finds there to be no Batson violation."

Is that a legally correct analysis of Batson?

MR. STEWART: It -- it is in that it means that he is finding the actual -- the reasons to be race-neutral in fact. Like, it is --

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

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

JUSTICE KAVANAUGH: No, no, if -- if they're -- if they're race-neutral, is that the end of the Batson analysis?

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

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

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

JUSTICE KAVANAUGH: Thank you.
MR. STEWART: What -- what I'm --
JUSTICE KAVANAUGH: That's -- thank you.
JUSTICE ALITO: But whether in the end they are race-neutral is the question, right?
MR. STEWART: That's right, Your Honor.
JUSTICE ALITO: And as to what she was objecting to, if she wasn't tacitly raising a pretext argument, what she said on 176 is, "Allow us to state into the record there is one of 12 -- of 14 jurors -- are non-white, whereas this county is approximately, what, 40 percent?" What she's -- what she's saying is that the -- the racial makeup of the jury that was selected was so starkly different from the racial makeup of the county that that would be sufficient to find that there were Batson violations.
MR. STEWART: Right -- that's right, Your Honor. And, actually, in the cert petition at page 38, the Petitioner emphasized this point as being part of the Batson presentation.

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

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

MR. STEWART: Two -- two objections there, Your Honor.

JUSTICE SOTOMAYOR: All right. So she's talking about the cross-rep -- the representation argument and the Batson argument.

On the Batson argument, the court starts with that and says: You have already made it in the record, so I'm of the opinion it is in the record. She says: I don't want to let the paneling of the jury go by without

having those objections. And the court thinks, I think you already made those, and they are clear in the record for the reasons previously stated. He says: All the reasons were race-neutral, blah, blah, blah.

And then, as to the other issue, the other issue is the jury pool issue, oh, I've already ruled based on prior rulings from this -- the United States Supreme Court and the State of Mississippi that jury selection was appropriate. That's -- that the jury itself, the pool, was appropriate. And those are noted for the record.

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

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

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

You pointed to this 40 percent issue that she talks about, the 12 of 14 jurors, but, as Justice Sotomayor points out, that discussion was in reference to the jury composition issue and not the Batson issue.

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

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

So I think we have to be clear about what's actually happening in the record and not ascribe to her representations that actually

don't fit.

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

JUSTICE JACKSON: Okay. Well, that's just not what the -- what the transcript shows, so --

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

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

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

JUSTICE JACKSON: Okay.

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

JUSTICE JACKSON: I don't -- I don't think it helps to -- to -- to misrepresent what the record obviously shows.

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

Is -- is -- is it your position that the argument -- that her argument was so central that the failure to present it waives any obligation of the court to rule on whether the reasons that the state has given are race-neutral and, therefore, there's no Batson violation here because she didn't say anything about it or, as you interpret the record, that alleviates the court of any obligation to say,

that's one thing that I think the Mississippi court is saying, but, on the other hand, they also say it isn't necessary for the court to give her a chance.

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

MR. STEWART: I'm not sure I'm completely following the question, Justice Jackson. What -- what I would say --

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

MR. STEWART: Right. So I -- I think, when you're -- if you get past step 2, the -- the court has to make an ultimate finding on non-discrimination, but it does so in light of the parties' submissions.

No -- no precedent of this Court requires the judge to consider matters, especially intricate competitive -- compare -- comparative juror arguments that are not presented to it. I mean, that's something this Court -- it's in light of the parties' submissions.

JUSTICE JACKSON: And your view is that --

CHIEF JUSTICE ROBERTS: Thank you.

Justice Jackson?

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

MR. STEWART: Well, it doesn't have to affirmatively do that. There's every indication that in the trial judge -- in the record here and a reasonable person could certainly read the record to allow multiple opportunities to present that. There's nothing

supporting the idea that the trial judge cut her off or certainly nothing compelling that view of the record, Justice Jackson.

CHIEF JUSTICE ROBERTS: Thank -- thank you, counsel.

Justice Thomas, anything further?

JUSTICE THOMAS: Yes. General Stewart, would you -- you were about to discuss the role of AEDPA in our review. Much of this is being discussed as though we're on de novo review. So would you discuss what AEDPA requires?

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

All those things mean that the -- that the Petitioner can't be granted relief under (d)(2). The record has to compel a finding that the trial judge failed on some factual

matter, and it just cannot possibly compel that finding.

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

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

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor?

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

MR. STEWART: I mean, given the entirety of this record, there's -- there's no other reasonable conclusion.

JUSTICE SOTOMAYOR: Well, no, no, no. I'm -- I'm saying your argument seems to be that only if the trial court said, counsel, sit down, Batson's been preserved, I don't want to hear anymore, that that's the only way that on AEDPA review we could say Mississippi made an unreasonable determination of fact?

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

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

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

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

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

JUSTICE SOTOMAYOR: No, the problem is --

MR. STEWART: -- she could have asserted --

JUSTICE SOTOMAYOR: -- that she was never given an opportunity on this record.

MR. STEWART: And --

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

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

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

In answer to Justice Barrett's

question, appellate courts can do their own comparative juror analysis even if not preserved below, correct?

MR. STEWART: They can.

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

Do you believe the Mississippi Supreme Court says it cannot consider those arguments because of the waiver or that it's choosing not to consider them?

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

JUSTICE SOTOMAYOR: It could do so?

MR. STEWART: It could do so.

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

MR. STEWART: I mean, that's what the -- that's what has been said in the case. I mean, Flowers versus State III, the -- the Flowers case, I mean, what the Court said was,

because the error in upholding the strike of Juror Pittman affects a substantial right, we apply the plain error rule to find a Batson violation occurred. So, I mean, we had the question --

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

MR. STEWART: It has discretion.

JUSTICE SOTOMAYOR: So, if the record is clear that there was a Batson violation -- and we can argue about each individual juror whether the record is clear or not -- I want you to make an assumption, if the record is clear that there was a Batson violation, would the Mississippi court have erred in failing to -- to conduct that review?

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

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

MR. STEWART: I mean, that's -- that's

consistent with the waiver or forfeiture of constitutional objections generally and with jury objections in particular.

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

MR. STEWART: And -- but state courts don't necessarily have do that. They can do -- do pure discretion. They can do different approaches. Nothing in this Court's cases bar that, Justice Sotomayor. And, I mean, I -- I would just emphasize that this is -- this is a rule that has been embraced by most federal courts of appeals, and it's one that was surely reasonably applied here.

JUSTICE SOTOMAYOR: Yes, because we apply plain error.

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

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

MR. STEWART: That -- that's not --

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

or -- or --

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

JUSTICE SOTOMAYOR: -- whether the error was harmless.

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

JUSTICE SOTOMAYOR: Yes.

MR. STEWART: I -- I come back to Ford versus Georgia, where the Court affirmed that state courts can adopt these timeliness rules. Perforce, those rules are going to block some claims, perhaps even some meritorious claims. And given that signal, it was surely reasonable to adopt this rule, which ultimately vindicates and enforces Batson itself and makes for better Batson rulings, as we --

JUSTICE SOTOMAYOR: Thank you, counsel.

MR. STEWART: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: General, I want to take you back to the conversation that you and I were having and that you were having with Justice Kavanaugh, which is just this question

of waiver, because I do believe that, given the Mississippi Supreme Court decision, that's the only question before us.

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

And, again, I'm just staring at this transcript, and I guess, as to that question, I don't really see the ambiguity in this transcript because this is coming after the fact of the prosecutor saying we had race-neutral reasons for all of them, and she says three times, I want to contest that. And the court says over and over, it's in the record, it's in the record, it's clear in the record.

And when a court says that to you three times, I actually don't believe that it's, like, I'm not going to say what can you do? I think she could have done more. I think she could have said: Judge, really, like, I'm

not moving on to anything else until I get this out.

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

The question before us is only whether she waived her objection. And how could she possibly have waived her claim that there was a Batson violation when she says it three times and the court says three times it's in the record, you've done it?

MR. STEWART: Okay. I appreciate that -- that, Justice Kagan. I'd -- I'd -- I'd make two points. One is I really have to emphasize it's not a holding that she waived the objection or the claim. It's a holding that she waived the pretext arguments, and that's critically different.

JUSTICE KAGAN: It's a -- it's -- I'm saying it's -- what they said -- the pretext

argument is just a way of establishing a Batson violation. So, if you keep on saying there's a Batson violation here, then you're saying there's something wrong with what the state has told you about their race-neutral justifications.

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

MR. STEWART: And what I'm saying, Your Honor, is that she had to give the judge a chance to rule on the comparative juror arguments that she later claimed were central to her argument. She did none of that. She didn't give the judge a chance to rule on it.

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

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

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

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

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

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

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

MR. STEWART: And -- and here's the -- here's the key point, Justice Kagan. Whenever my friend or any hypothetical needs to suggest the -- the judge cut her -- cut her off, it

always has to use words that are not in the transcript. And she referred not to pretext, not to the desire to make more arguments. She didn't say, you know, Your Honor, I -- I didn't make some arguments that I would like to make, can I just take a moment to preserve those?

And every indication of this record is that he would have allowed her to. I mean, he allowed her to make an extended argument challenging death qualifications even though she conceded it was doomed. I mean, she talked about carpool routes and juror medical issues and jurors being married to each other. When she wanted to say something, she did.

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

JUSTICE KAGAN: Thank you.

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Briefly, I hope.

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

MR. STEWART: Very good.

(Laughter.)

JUSTICE GORSUCH: Okay?

MR. STEWART: We --

JUSTICE GORSUCH: If this Court would find there's an unreasonable determination of fact, but under 2254(a), of course, we can only grant a writ if we find a violation of the Constitution. So there's obviously more work to be done after we decide the waiver issue. Can you explain how that's going to proceed?

MR. STEWART: I mean, I think, number one, there would need to be a showing of a substantive, I think, Batson violation, potentially, overcoming (e)(1), for example, in district court. If this -- if -- if -- if this

Court or the lower courts were to think that that -- that law and justice were -- were -- were shown in this case to -- to warrant issuance of the writ, I mean, I think it would go back to the state courts. I mean, this -- this would depend if the Court finds a substantive Batson violation, I think --

JUSTICE GORSUCH: Well, no, we're not -- we're likely -- assume we're not going to make that inquiry, that we're going to confine ourselves to what we spent the last two hours talking about, which is the waiver issue, okay, and we find an unreasonable determination on the waiver issue.

What more does a federal court need to do?

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

arguments, that would be the -- the measured remedy there.

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

You -- you've said that she could have jumped in again after that colloquy on 175 after she twice raises it. But, at the end of

that, the district court says, "The court finds there to be no Batson violation."

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

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

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

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

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

JUSTICE KAVANAUGH: Right.

MR. STEWART: -- I agree with that.

(Laughter.)

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

And what he says happens is it stopped after two steps. Simply put, no state court, whether it be the majority in the Mississippi Supreme Court or the trial court, conducted a full three-step Batson inquiry.

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

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

So I think, you know, whether the

trial judge misunderstood the third step or the trial judge was just, you know, rushing it along to try to keep things moving or whatever, it just never happened.

MR. STEWART: And --

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

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

JUSTICE KAVANAUGH: Okay.

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

here.

Could it have used better, more clear words? I think, you know, of -- of course, that's true, but what I think the judge was really doing was he wanted to be clear. I am finding these race-neutral in fact. I think that is what he was doing. That is surely a permissible view of the transcript. And, therefore, on clear error and, certainly, on AEDPA review, I think it is the compelled view in this case.

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: General Stewart, I

just want to understand your answer to Justice Gorsuch on remedy. So, if we think that the Mississippi Supreme Court was wrong on the forfeiture/waiver point, I don't understand how it gets back.

You said something about it getting, you said this in your brief, something about it getting back to the Mississippi courts. Wouldn't the remedy be that we send it back down below for then the federal courts to analyze whether there was a Batson violation based on the comparative juror evidence?

MR. STEWART: I mean --

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

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

JUSTICE BARRETT: Yeah.

MR. STEWART: -- this Court, certainly, Your Honor. I -- I think we're responding to the suggestion that the writ should issue here at all. I mean, my -- my friend has maintained that the writ should flat

out issue ordering release or retrial.

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

And that could be something that is resolved by the state courts and would eliminate the constitutional violation.

JUSTICE BARRETT: So you're saying the district court shouldn't -- if -- if we sent it back down -- I agree, we did not grant cert on the Batson question, so that's not for us to decide.

But, if we sent it back down, you don't think that the district court, you know, or -- or, frankly, the Fifth Circuit -- I mean, he said that the court has what it needs in the record to look at the comparative juror analysis. Why couldn't the federal courts make the Batson determination themselves?

MR. STEWART: I think that would also be an option. I mean, I think, if the -- if you sent it back down to the Fifth Circuit and said, hey, look, you know, you were wrong to

find waiver, I mean, I think it would have everything it needs in the Fifth Circuit to just flat out rule on the Batson violation. As we -- as we said, you obviously know the merits of our position, Your Honor, on that one.

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

MR. STEWART: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Jackson, anything further?

Thank you, counsel.

MR. STEWART: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Ms. Ferguson.

ORAL ARGUMENT OF EMILY M. FERGUSON

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

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

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

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

Justice is better served when these questions are aired before the jury is sworn, when any errors can be fixed, rather than through a cold record on appeal.

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

This Court should affirm.

I welcome the Court's questions.

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

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

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

And the judge does say: You -- you know, you've -- you've already made those, they're clear in the record. In other words, his response, the -- the judge's response to I'd like to reserve them is that you have.

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

And the fair cross-section requirement applies to the venire, not to the selected

jury. So, when the defense counsel is referring to the number of black jurors who are on the selected jury, not on the venire, that necessarily is an argument in support of the Batson claim and -- and shouldn't be an argument in support of the fair cross-section claim because she's talking about the selected jury.

And so I think the -- the suggestion that that was only about the fair cross-section claim and not about the Batson claim just doesn't make a ton of sense. And I think it shows that she was, in fact, given the opportunity to raise additional Batson arguments and she chose not to raise any -- any argument as to jurors.

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

MS. FERGUSON: I -- I do think that that's when she took the opportunity. And she could have said, you know, if I may, Your Honor, I have additional arguments to make. She didn't do that either before she said I'm

going to want to make or after she said I'm going to want to make.

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

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

JUSTICE SOTOMAYOR: All right. So, if the juror comparison is clear from the record that there was a Batson error, that could be reviewed and should be reviewed by the Mississippi court. No?

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

And it --

JUSTICE SOTOMAYOR: If the step 3 analysis was never done by the court, how could it not be an abuse of discretion to fail to

have done -- done it by someone?

MS. FERGUSON: What --

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

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

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

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

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

MS. FERGUSON: I -- I'd add one more response on that as to the existence of a step 3 finding here, and that's, on -- in this Court's decision in Purkett, the Court said that the state court had found at step 3 that the prosecutor was not motivated by discriminatory intent. And the -- the way the Court describes the facts in that case is that the state trial court, without explanation, overruled respondent's objection and empaneled

the jury.

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

JUSTICE KAVANAUGH: How could there be a step 3 finding if usually that's evaluating whether the race-neutral reason is the true reason or whether instead it was pretext? If there has been no argument that it's been pretext, how could there be a step 3 analysis? That's Point 1.

And then Point 2, Judge Mills, who evaluated this, the federal habeas court, flat-out said multiple times it ended at step 2.

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

I think that saying all the reasons were race-neutral, to Justice Alito's point, demonstrates that the trial court at least

implicitly had found those to be the actual reasons.

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

But, here, you had the -- the state court say all of the reasons were race-neutral. And I think that's enough, particularly given what this Court found in Purkett, to show that there was an implicit credibility finding there.

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

MS. FERGUSON: Justice Jackson, I think the answer is the same, and that's because, again, if the reasons are race-neutral, that implies that those are the actual reasons. And that's distinct from

saying the prosecutor has stated --

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

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

JUSTICE JACKSON: You didn't just say that if they're race-neutral, then that means they are the real reasons?

MS. FERGUSON: I -- I think if the actual reasons are race-neutral, so not whether the stated reasons are race-neutral. If the prosecutor has merely stated race-neutral reasons and the trial court doesn't credit those -- those reasons, or if there's any reason to believe that those are not the real reasons that the prosecutor exercised the strikes, then you could have --

JUSTICE JACKSON: Isn't there also a -- a more complex way of looking at this that Miller-El brings up, which is not reason by reason but sort of the -- the -- the

comparison, right? There's no indication here that this court did any sort of comparative work, which would have been what we would have expected from the district -- I mean from the defense counsel if given an opportunity, correct?

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

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

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

And, necessarily, if the judge finds that the reasons were race-neutral, then

race-neutral reasons, in fact, being exercised is incompatible with a finding of intentional discrimination.

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

And so I guess I'm trying to understand the United States' interest. Your -- your -- your brief doesn't really pay a lot of attention or devote a lot of time to defending the actual conviction. So what -- what is the principle that you are seeking to have upheld in this case in which it's clear that the defense counsel said several times, I have a Batson objection and tried to preserve it, and the court, if anything, misled her into believing that she had preserved it by saying it's in the record? Why is the United States interested in being involved in this case?

MS. FERGUSON: Well, Your Honor, the

United States is a party in many trials, including many criminal trials, and is subjected to Batson objections and defends in Batson cases. And so I think our interest is in defending the right of courts of appeals to exercise their discretion to consider juror comparison arguments and -- and not as, I think, Petitioner, if I may, Your Honor --

CHIEF JUSTICE ROBERTS: Sure.

MS. FERGUSON: Not as Petitioner argued in Petitioner's brief, although it seemed to -- to walk away from today, adopt a rule that appellate courts must consider juror comparison arguments when they are raised for the first time on appeal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

Justice Sotomayor?

Justice Kagan?

JUSTICE KAGAN: Ms. Ferguson, I want to go back to what you were saying before, and I'll -- I'll grant you something. I'm going to assume your view that the judge here did not

collapse stage 2 and stage 3 and the judge understood what he was doing and that the judge made a determination that there was no Batson violation, the determination that you would make at the end of the day, all right?

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

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

MS. FERGUSON: Well, Your Honor, I

would -- I agree with the state that there's a distinction between observing -- preserving a claim and preserving particular arguments. And simply saying I disagree with the ultimate finding is not sufficient to preserve every possible pretext argument under the sun.

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

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch?

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

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

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

MS. FERGUSON: No, Your Honor, and, in fact, this Court has repeatedly reaffirmed both in the context of Batson claims in state courts, in Batson and in Ford versus Georgia, the Court has reaffirmed that procedural rules are permissible, and then, in Singleton versus Wulff, this Court affirmed that courts of appeals in the federal system have discretion over when to accept unpreserved arguments on appeal.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

JUSTICE BARRETT: Just one question, Ms. Ferguson.

Is it unusual for the United States to

appear as an amicus when we have a constitutional question before us that affects the United States in litigation?

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

Thank you, counsel.

Rebuttal, Mr. Perkovich.

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

MR. PERKOVICH: Just a few quick points. First, I want to address the -- the issue with may not in the Woodward case that constrained on direct review the inquiry. And that's simply the point. At that gateway issue, there was an understanding that they clearly may and this Court has done so routinely. So that's our fundamental point on that.

With respect to the procedural sort of rules that Ford versus Georgia endorse as a basic principle, we have no qualm with that. That is a timely objection rule. Of course,

that's not applicable here.

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

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

And that's where the work of the court at a minimum, the trial judge, is required, whatever is being pressed by the opponent of the strike for the reasons I've pointed to and are -- are spoken to forcefully in Powers with regard to the other stakeholders and the broader stakes for our society with regard to the Equal Protection Clause in this context.

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

And so, when that framework breaks

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

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

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

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