

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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P R O C E E D I N G S

(10:27 a.m.)

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

Mr. Perkovich.

ORAL ARGUMENT OF JOSEPH J. PERKOVICH

ON BEHALF OF THE PETITIONER

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

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

What is more, proper credibility

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

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

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

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

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

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

11 I welcome the Court's questions.

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

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

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

20 MR. PERKOVICH: Trial counsel --

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

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

25 JUSTICE THOMAS: What was the

1 objection?

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

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

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

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

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

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

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

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

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

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

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

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

1 Fourteenth Amendment racial discrimination.

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

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

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

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

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

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

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

1 asking the court for the opportunity to do so?

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

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

13 MR. PERKOVICH: Yes, Justice --

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

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

1 Batson inquiry holds, which is three steps.

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

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

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

21 JUSTICE KAVANAUGH: Well, after the --

22 JUSTICE BARRETT: But, I guess --

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

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

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

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

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

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

1 addressed and -- and so her --

2 JUSTICE SOTOMAYOR: Counsel --

3 MR. PERKOVICH: Yes, Your Honor.

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

8 MR. PERKOVICH: Yes.

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

11 MR. PERKOVICH: Yes.

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

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

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

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

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

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

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

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

25 MR. PERKOVICH: Right.

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

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

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

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

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

1 opportunity to impeach that reason essentially.
2 Right?

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

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

9 MR. PERKOVICH: Yes, Your Honor.

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

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

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

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

24 JUSTICE BARRETT: Some overlap?

25 MR. PERKOVICH: -- of the general

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

3 JUSTICE BARRETT: A discrete
4 challenge.

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

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

13 MR. PERKOVICH: Right.

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE BARRETT: So you're --

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

25 JUSTICE SOTOMAYOR: Counsel, I -- I

1 think --

2 JUSTICE ALITO: Mr. Perkovich --

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

5 MR. PERKOVICH: Yes.

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

10 MR. PERKOVICH: Yes.

11 JUSTICE SOTOMAYOR: And --

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

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

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

25 MR. PERKOVICH: Right.

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

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

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

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

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

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

1 like this.

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

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

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

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

1 well, anyway, I don't understand it.

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

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

20 MR. PERKOVICH: Yes.

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

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

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

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

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

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

6 MR. PERKOVICH: Right.

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

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

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

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

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

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

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

15 MR. PERKOVICH: Okay.

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

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

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

5 JUSTICE GORSUCH: I -- I appreciate --

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

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

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

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

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

21 JUSTICE GORSUCH: Really?

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

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

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

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

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

6 MR. PERKOVICH: No, Your Honor.

7 Actually --

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

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

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

17 MR. PERKOVICH: Mm-hmm.

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

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

25 JUSTICE GORSUCH: Sure, to say no

1 Batson violation basically.

2 MR. PERKOVICH: To -- to --

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

9 MR. PERKOVICH: That is -- yes.

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

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

19 MR. PERKOVICH: That's right.

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

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

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

3 Now maybe that's wrong, okay?

4 MR. PERKOVICH: Well --

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

9 MR. PERKOVICH: Well, Justice --

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

13 MR. PERKOVICH: Well --

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

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

1 make a determination, whatever is said in
2 pressing that burden of persuasion.

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

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything further?

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

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

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

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

6 So what else is there?

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

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

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

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

24 MR. PERKOVICH: I'm sorry.

25 (Laughter.)

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

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

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

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

14 JUSTICE THOMAS: Yes.

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

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

23 MR. PERKOVICH: Well, no more than was
24 done here, Your Honor. The challenge --
25 there's no question that the Batson challenge

1 for the four strikes in question here was
2 timely, never waive -- never withdrawn.

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

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

12 JUSTICE THOMAS: And how many?

13 MR. PERKOVICH: I believe it was 11.

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

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

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

23 MR. PERKOVICH: Seven.

24 JUSTICE THOMAS: And how many -- what
25 was the racial breakdown?

1 MR. PERKOVICH: Three to four.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

1 MR. PERKOVICH: Well -- well --

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

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

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

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

21 MR. PERKOVICH: And --

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

25 MR. PERKOVICH: Yes, Your Honor.

1 JUSTICE ALITO: -- during voir dire?

2 So the defense counsel could say:

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

8 MR. PERKOVICH: Justice Alito,
9 there --

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

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

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

25 JUSTICE ALITO: Well, I -- okay, I --

1 I understand. But your -- your -- your
2 argument is that even in the example that I
3 gave you where the judge says: Defense
4 counsel, do you have anything to say about
5 this? And defense counsel says: No, nothing
6 to say. That that is not -- that there could
7 still be a violation there?

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

10 JUSTICE ALITO: Okay.

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

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

21 MR. PERKOVICH: Well, if there's a
22 pause and nothing is said, then that's a
23 different record from what we have. To return
24 to the -- the -- sort of these
25 legitimate-seeming race-neutral reasons, again,

1 the disinterest in questioning on any of the
2 reasons that are offered there is -- has been
3 repeatedly recognized by this Court as denoting
4 a sham. In fact, that's language in -- in
5 Miller-El and Snyder as well.

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

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

19 MR. PERKOVICH: Well, no.

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

22 MR. PERKOVICH: Justice Alito, I'm
23 referring to the duty that the court has.
24 Whatever is advanced in terms of the burden of
25 persuasion that the opponent has, the court

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

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

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

1 here and question --

2 MR. PERKOVICH: Well --

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

5 MR. PERKOVICH: Justice --

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

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

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

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

1 this record and to make an assessment, whatever
2 is advanced here.

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

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

11 MR. PERKOVICH: Okay.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

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

24 MR. PERKOVICH: None.

25 JUSTICE SOTOMAYOR: No pause between

1 the four jurors and the race-neutral reason.
2 So there's no chance for the defense attorney
3 to say anything, correct?

4 MR. PERKOVICH: That's right.

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

11 MR. PERKOVICH: That's right.

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

19 MR. PERKOVICH: Right.

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

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

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

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

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

18 MR. PERKOVICH: Exactly.

19 JUSTICE SOTOMAYOR: -- in asking
20 questions.

21 Now, going to the question that -- at
22 no point did the justice say -- did the
23 lawyer -- the judge here say, I'm doing step 3
24 in any way, that these were not pretext or that
25 the -- that I find them to be both race-neutral

1 and not race-based, correct?

2 MR. PERKOVICH: That's correct.

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

7 MR. PERKOVICH: Mm-hmm.

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

16 That's not an implicit finding on step
17 3 because he's still relying simply on step --
18 on -- on the race neutrality, correct?

19 MR. PERKOVICH: Yes, Justice
20 Sotomayor.

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

23 MR. PERKOVICH: I don't --

24 JUSTICE SOTOMAYOR: -- under step 3.

25 MR. PERKOVICH: Yes. I don't see how

1 you can read that and -- and take away the
2 suggestion of anything more than a
3 determination of race neutrality. And, as I've
4 tried to emphasize, there is a very big
5 difference between race-neutral and credible.
6 And that court has to make a credibility
7 finding no matter what else happens in that
8 courtroom.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?
11 Justice Kavanaugh?

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

19 MR. PERKOVICH: Yes.

20 JUSTICE KAVANAUGH: But what happened
21 here, I gather, your position is, and what
22 Judge Mills, the district judge in the habeas
23 case, found was, you know, Judge Mills said
24 "perhaps Pitchford's counsel should have been
25 more assertive, but the court will not fault

1 them for failing to present specific arguments
2 on pretext when the trial court appeared to
3 have been resolute in its brusque determination
4 that no violation had occurred."

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

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

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

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

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

25 And she sought to be heard before it

1 was too late. And then, at the next moment, as
2 Justice Sotomayor pointed out, where she could
3 address these issues in the motion for new
4 trial, that was done, adequately so. It was
5 fit for purpose in terms of the motion for new
6 trial.

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

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

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

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

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

25 JUSTICE BARRETT: So you are asking us

1 to say something different? Or -- or do you
2 agree that states have the right to come up
3 with rules of forfeiture even for Batson
4 objections?

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

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

23 I'm just saying you don't disagree, do
24 you, with the fundamental proposition that a
25 state can establish procedural rules requiring

1 the timely assertion of Batson objections?

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

5 JUSTICE BARRETT: You would agree with
6 that. Great.

7 MR. PERKOVICH: The very last
8 formulation, though.

9 JUSTICE BARRETT: Okay. Thanks.

10 MR. PERKOVICH: You're welcome.

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

21 MR. PERKOVICH: Well, I think the
22 first point here is that the understanding of
23 its own law for Batson was that it could not,
24 right, and that it was unable to consider
25 arguments pressed for the first time on appeal,

1 especially in a context where the first
2 opportunity to do that was on appeal. That's a
3 problem.

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

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

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

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

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

25 JUSTICE BARRETT: So is it obligation

1 or discretion?

2 (Laughter.)

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

6 MR. PERKOVICH: Right.

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

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

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

25 MR. PERKOVICH: I think,

1 unfortunately, that was the ball game for the
2 state supreme court, and -- and, there, they
3 elected not to do that. They had -- in that
4 fork in the road, they could have taken what
5 was submitted on appeal and make a merits
6 decision or remand it.

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

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

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

25 MR. PERKOVICH: Yes, Justice Barrett.

1 And the court had done just that in other
2 cases.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

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

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

22 So, to the extent that people have
23 asked what was supposed to happen here, I
24 suppose, if we're in a world that Justice
25 Thomas posits, if the defense counsel, when we

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

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

20 MR. PERKOVICH: Yes.

21 JUSTICE JACKSON: I mean, in -- in --
22 in -- in -- you -- you would expect the court
23 to say something like: Hearing no evidence or
24 argument related to pretext and seeing no basis
25 in this record for determining that the

1 prosecutor's race-neutral reasons were
2 pretextual, I find that there is no race
3 discrimination or whatnot, right?

4 Like, the court has to make a
5 finding --

6 MR. PERKOVICH: Yeah.

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

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

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

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

1 to do the things that you've outlined.

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

5 MR. PERKOVICH: Yes.

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

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

24 What would be wrong with that?

25 MR. PERKOVICH: Not -- not anything I

1 can think of.

2 (Laughter.)

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

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

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Stewart?

20 ORAL ARGUMENT OF SCOTT G. STEWART

21 ON BEHALF OF THE RESPONDENTS

22 MR. STEWART: Mr. Chief Justice, and
23 may it please the Court:

24 In *Flowers versus Mississippi*, this
25 Court faced an extraordinary case and ruled

1 against the state. This case is also
2 extraordinary but in a very different way that
3 requires a very different result. Start with
4 the facts in (d)(2).

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

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

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

22 Now take the law. In Ford versus
23 Georgia, this Court ruled that lower courts can
24 adopt timely preservation rules to implement
25 Batson. Many courts have done that and adopted

1 a waiver rule like the one applied here.
2 Petitioner ignores Ford -- Ford versus Georgia,
3 he never cites it once, and he asks this Court
4 to declare that a rule adopted by most federal
5 courts of appeals is not just wrong but
6 objectively unreasonable. That is
7 extraordinary.

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

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

22 As I said when I began, this case is
23 extraordinary. Petitioner has conceded all
24 that is central to his claim. Never has this
25 Court granted relief under AEDPA when a habeas

1 petitioner has so decisively doomed his own
2 case. This case should not be the first.

3 I welcome the Court's questions.

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

8 What's your reaction to that?

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

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

23 MR. STEWART: I think Miller-El
24 requires really no more than, on federal habeas
25 review, state courts cannot make factual

1 rulings that are objectively unreasonable.
2 That's all Miller-El decided. It didn't reach
3 the validity of a state procedural rule. It
4 didn't rely or -- or cite or overrule or even
5 touch Ford versus Georgia. It didn't reach any
6 of those things at all.

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

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

25 JUSTICE JACKSON: But didn't the court

1 say it was preserved? I mean, she was
2 obviously saying, I would like to make my
3 record with respect to the Batson observations.
4 As the Chief Justice points out, she says, at
5 some point, I would like to do that.

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

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

15 JUSTICE JACKSON: You mean --

16 MR. STEWART: -- Jackson.

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

19 MR. STEWART: Oh, yes. Of course.

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

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

25 JUSTICE JACKSON: But -- but, when she

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

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

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

23 MR. STEWART: Right.

24 JUSTICE KAVANAUGH: She's trying to
25 make the objections right there, and he says,

1 you already made them and there's no Batson
2 violation, and he makes a legal error in the
3 course of that by saying, because they're
4 race-neutral, there's no Batson violation,
5 which, of course, is not the correct inquiry, I
6 think you would -- you would acknowledge.

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

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

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

24 I don't know, at that point, she could
25 have said, well, you're wrong, Judge. I get

1 that. And Justice Alito has a good -- good
2 points on that. But it seems pretty clear at
3 that point.

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

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

15 MR. STEWART: I mean, not at all, Your
16 Honor. I mean, the very next page, on page
17 176 --

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

24 MR. STEWART: Well, I think -- and
25 this would get back to, I think, you know,

1 you -- you, I think, framed it correctly
2 earlier, Justice Kavanaugh, where you said, you
3 know, look, is it objectively unreasonable, is
4 (d)(2) met?

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

21 I'd close the point by noting at page
22 176 that the judge then did allow her to state
23 the composition of the jury, her assertions
24 about the composition of the county. And, you
25 know, so she -- she had an opportunity to add

1 more, and that's all she added, was bare
2 numbers.

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

9 JUSTICE KAVANAUGH: Well, that's --

10 JUSTICE KAGAN: But, General --

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

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

21 So you're right, General, she should
22 have said a lot more stuff. She should have
23 been more assertive. But the only question
24 before us is, did she waive her objection when,
25 three times, she's told by the court, your

1 objection is in the record, I hear you.

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

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

9 (Laughter.)

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

12 JUSTICE KAGAN: I'm sorry, General
13 Stewart.

14 MR. STEWART: My apologies, Justice
15 Kagan.

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

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

25 JUSTICE KAGAN: This is after the

1 prosecutor has given all his race-neutral
2 reasons, and she's still objecting. So what
3 could she be objecting to at that point?

4 MR. STEWART: Oh, I agree --

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

10 MR. STEWART: But --

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

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

21 JUSTICE KAGAN: I think you're arguing
22 this on the merits. I think you're saying she
23 didn't say enough to allow the court to find
24 for her. But that's not the question before
25 us. The question before us is whether the --

1 the state supreme court was right when it said
2 she waived her argument. She might not have
3 presented a good argument, but she didn't waive
4 her argument.

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

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

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

25 MR. STEWART: I mean, I -- I think

1 what we -- I mean, she -- I think she's saying,
2 like, I -- I believe that I've made my case. I
3 mean --

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

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

12 JUSTICE KAVANAUGH: Exactly.

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

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

23 MR. STEWART: I mean, I think it's the
24 ultimate conclusion the district judge reached
25 or -- pardon me -- the trial judge reached,

1 that they were -- that they were race-neutral,
2 in fact, and she hadn't shown discrimination.
3 I mean, I think that --- that's why I think
4 she -- she uses the word "reserve." And I
5 think she wants to make sure -- I mean,
6 that's -- that's the 175. She says, I'd like
7 to reserve my --

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

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

19 MR. STEWART: Yes, Your Honor.

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

25 Is that a legally correct analysis of

1 Batson?

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

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

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

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

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

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

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

22 JUSTICE KAVANAUGH: Thank you.

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

24 JUSTICE KAVANAUGH: That's -- thank
25 you.

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

3 MR. STEWART: That's right, Your
4 Honor.

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

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

22 JUSTICE SOTOMAYOR: Counsel, I don't
23 know how that could be. She starts her
24 colloquy in that section by saying, I want --
25 at -- at some point, the defense is going to

1 want to reserve both its Batson objection and a
2 straight for Tenth Amendment racial
3 discrimination.

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

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

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

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

1 race-neutral, blah, blah, blah.

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

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

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

22 JUSTICE JACKSON: But, counsel, I -- I
23 think, in fairness, Justice Kavanaugh asked you
24 what more could she have done or why wasn't
25 she, you know, responding to or trying to say

1 that there's pretext when she was talking about
2 the Batson question.

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

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

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

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

23 MR. STEWART: Can I make -- make two
24 quick responses to that, Justice Jackson? One
25 is my friend conceded this morning that that

1 point went to her trying to get to the -- the
2 Batson claim itself. And also --

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

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

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

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

21 JUSTICE JACKSON: Okay.

22 MR. STEWART: -- I would also add she
23 did it without prompting. There was -- there
24 was no, you know, would you like to say more?
25 I mean, she said the more that she wanted to

1 say. And the key thing is, even when she had
2 that opportunity, she did not present the
3 comparative juror argument.

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

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

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

25 So either it's central, in which case

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

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

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

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

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

1 Court -- it's in light of the parties'
2 submissions.

3 JUSTICE JACKSON: And your view is
4 that --

5 CHIEF JUSTICE ROBERTS: Thank you.
6 Justice Jackson?

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

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

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

1 Justice Thomas, anything further?

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

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

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

23 As I've emphasized, I mean, Petitioner
24 himself took a very different view of the --
25 the record and he now says the view that he

1 took is objectively unreasonable. And I think
2 that goes for the legal matters too, Your
3 Honor. There has to be something objectively
4 unreasonable here.

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

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Justice Alito?
12 Justice Sotomayor?

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

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

24 JUSTICE SOTOMAYOR: Well, no, no, no.
25 I'm -- I'm saying your argument seems to be

1 that only if the trial court said, counsel, sit
2 down, Batson's been preserved, I don't want to
3 hear anymore, that that's the only way that on
4 AEDPA review we could say Mississippi made an
5 unreasonable determination of fact?

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

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

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

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

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

25 JUSTICE SOTOMAYOR: No, the problem

1 is --

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

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

6 MR. STEWART: And --

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

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

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

20 In answer to Justice Barrett's
21 question, appellate courts can do their own
22 comparative juror analysis even if not
23 preserved below, correct?

24 MR. STEWART: They can.

25 JUSTICE SOTOMAYOR: That's what

1 happened in Miller-El and Snyder.

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

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

9 JUSTICE SOTOMAYOR: It could do so?

10 MR. STEWART: It could do so.

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

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

25 JUSTICE SOTOMAYOR: So Mississippi has

1 a similar plain error rule? It has discretion
2 to overlook a waiver, correct?

3 MR. STEWART: It has discretion.

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

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

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

19 MR. STEWART: I mean, that's -- that's
20 consistent with the waiver or forfeiture of
21 constitutional objections generally and with
22 jury objections in particular.

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

25 MR. STEWART: And -- but state courts

1 don't necessarily have to do that. They can do --
2 do pure discretion. They can do different
3 approaches. Nothing in this Court's cases bars
4 that, Justice Sotomayor. And, I mean, I would
5 just emphasize that this is -- this is a rule
6 that has been embraced by most federal courts
7 of appeals, and it's one that was surely
8 reasonably applied here.

9 JUSTICE SOTOMAYOR: Yes, because we
10 apply plain error.

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

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

15 MR. STEWART: That's not --

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

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

23 JUSTICE SOTOMAYOR: -- whether the
24 error was harmless.

25 MR. STEWART: May I -- may I respond

1 to that one, Justice Sotomayor?

2 JUSTICE SOTOMAYOR: Yes.

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

12 JUSTICE SOTOMAYOR: Thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

22 The question is not whether this
23 defense counsel put enough in the record to
24 actually prevail on a Batson claim. The
25 question is instead whether the Mississippi

1 Supreme Court got it really wrong when it said
2 that she had waived her argument that there was
3 a Batson violation.

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

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

21 But, on the other hand, it's hardly
22 ineffective assistance of counsel to make a
23 different kind of choice, to say: I don't want
24 to antagonize this judge. If he's insisting on
25 moving on, I better move on. That probably was

1 a wrong decision. I'll say that that
2 definitely was a wrong decision. But that's
3 not the question before us.

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

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

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

25 And if you tell me that she had to use

1 the word "pretext" in what she was saying, I'll
2 tell you that's not the standard.

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

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

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

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

22 MR. STEWART: No, respectfully, he --
23 he didn't say that, Justice Kagan. He -- he
24 agreed that the objection was in the record.
25 And all she said was, I want to reserve the

1 objection. And he said it's -- you know,
2 that's what he gave her a signal to.

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

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

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

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

25 And every indication of this record is

1 that he would have allowed her to. I mean, he
2 allowed her to make an extended argument
3 challenging death qualifications even though
4 she conceded it was doomed. I mean, she talked
5 about carpool routes and juror medical issues
6 and jurors being married to each other. When
7 she wanted to say something, she did.

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

15 JUSTICE KAGAN: Thank you.

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

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 JUSTICE GORSUCH: Briefly, I hope.

22 Should you lose, what is the
23 appropriate remedy? Let's say you lose on the
24 (d)(2), so there's an unreasonable
25 determination of fact. I know you're going to

1 want to fight the hypothetical, but please
2 don't.

3 MR. STEWART: Very good.

4 (Laughter.)

5 JUSTICE GORSUCH: Okay?

6 MR. STEWART: We --

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

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

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

8 What more does a federal court need to
9 do?

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

21 I think that would be consistent, for
22 example, with what's appeared when, say, habeas
23 is granted for -- on a question of whether a
24 confession was voluntary. You don't
25 necessarily need to do a retrial -- retrial.

1 You just need to see if the confession was
2 voluntary. If it is, things can stand. I
3 think similarly here, Justice Gorsuch.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

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

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

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

25 MR. STEWART: Agree with that framing

1 because, you know, again, made the objection,
2 Your Honor. I think that's the critical thing.

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

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

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

19 JUSTICE KAVANAUGH: Right.

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

21 (Laughter.)

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

1 he's applying AEDPA unreasonable.

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

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

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

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

23 MR. STEWART: And --

24 JUSTICE KAVANAUGH: That's Judge
25 Mills, again, applying AEDPA or at least

1 articulating it, but I agree with Justice
2 Thomas completely. We have to look through
3 the -- the AEDPA standards here.

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

14 JUSTICE KAVANAUGH: Okay.

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

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

1 therefore, on clear error and, certainly, on
2 AEDPA review, I think it is the compelled view
3 in this case.

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

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

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

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

23 You said something about it getting,
24 you said this in your brief, something about it
25 getting back to the Mississippi courts.

1 Wouldn't the remedy be that we send it back
2 down below for then the federal courts to
3 analyze whether there was a Batson violation
4 based on the comparative juror evidence?

5 MR. STEWART: I mean --

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

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

12 JUSTICE BARRETT: Yeah.

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

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

24 And that could be something that is
25 resolved by the state courts and would

1 eliminate the constitutional violation.

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

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

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

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

25 MR. STEWART: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson, anything further?

3 Thank you, counsel.

4 MR. STEWART: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Ms. Ferguson.

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

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

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

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

1 strike when the reasons are top of mind.

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

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

11 This Court should affirm.

12 I welcome the Court's questions.

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

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

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

1 to reserve these questions.

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

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

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

25 And so I think the -- the suggestion

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

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

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

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

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

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

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

13 And it --

14 JUSTICE SOTOMAYOR: If the step 3
15 analysis was never done by the court, how could
16 it not be an abuse of discretion to fail to
17 have done -- done it by someone?

18 MS. FERGUSON: Well --

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

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

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

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

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

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

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

23 JUSTICE KAVANAUGH: How could there be
24 a step 3 finding if usually that's evaluating
25 whether the race-neutral reason is the true

1 reason or whether instead it was pretext? If
2 there has been no argument that it's been
3 pretext, how could there be a step 3 analysis?
4 That's Point 1.

5 And then Point 2, Judge Mills, who
6 evaluated this, the federal habeas court,
7 flat-out said multiple times it ended at step
8 2.

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

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

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

1 reasons was sufficient.

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

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

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

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

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

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

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

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

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

25 JUSTICE JACKSON: Right. So, if -- if

1 the comparison is also a part of the
2 determination of pretext, how does this record
3 indicate that the court did any of that kind of
4 analysis?

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

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

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

1 shooter, a felony murder scenario.

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

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

24 CHIEF JUSTICE ROBERTS: Sure.

25 MS. FERGUSON: Not as Petitioner

1 argued in Petitioner's brief, although it
2 seemed to -- to walk away from today, adopt a
3 rule that appellate courts must consider juror
4 comparison arguments when they are raised for
5 the first time on appeal.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 Justice Alito?

10 Justice Sotomayor?

11 Justice Kagan?

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

21 In exchange for my assuming your view
22 on that, I need you to assume my view on
23 something else, which is that the defense
24 counsel understood that that's the stage that
25 they were in; in other words, that now they

1 were talking about the ultimate Batson
2 violation, and what she was objecting to was
3 the finding of the ultimate Batson violation.

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

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

22 And so I think there needed to be some
23 form of even gesturing at juror comparisons.
24 There was nothing in the record at all until
25 after trial to suggest that Petitioner's

1 counsel thought that there was a problem with
2 white jurors not being struck who shared
3 characteristics with the black jurors who were
4 struck.

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

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

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

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

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

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

25 MS. FERGUSON: No, Your Honor, and, in

1 fact, this Court has repeatedly reaffirmed both
2 in the context of Batson claims in state
3 courts, in Batson and in Ford versus Georgia,
4 the Court has reaffirmed that procedural rules
5 are permissible, and then, in Singleton versus
6 Wulff, this Court affirmed that courts of
7 appeals in the federal system have discretion
8 over when to accept unpreserved arguments on
9 appeal.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 Justice Barrett?

13 JUSTICE BARRETT: Just one question,
14 Ms. Ferguson.

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

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

21 JUSTICE BARRETT: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 Thank you, counsel.

25 Rebuttal, Mr. Perkovich.

1 REBUTTAL ARGUMENT OF JOSEPH J. PERKOVICH

2 ON BEHALF OF THE PETITIONER

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

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

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

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

1 race-neutral and determining it is credible.

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

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

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

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

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

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