No.

IN THE SUPREME COURT OF THE UNITED STATES

LISA JO CHAMBERLIN,
Petitioner,
vs.
MARSHALL FISHER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * *

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the petitioner, by and through counsel, and moves the Court for its order permitting her to file the attached petition for a writ of habeas corpus *in forma pauperis*. Petitioner has proceeded *in forma pauperis* at all stages of this proceeding in the courts of the United States, and is represented by the undersigned counsel pursuant to an appointment under the Criminal Justice Act.

Respectfully submitted,

/s/ Elizabeth Unger Carlyle

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LISA JO CHAMBERLIN, Petitioner

v.

MARSHALL L. FISHER, Respondent

On Petition for Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A Black prospective juror on the strike panel in Lisa Jo Chamberlin's death penalty case was seven times more likely to be stricken than a white prospective juror. When challenged under *Batson*, the prosecutor identified as his only reasons for striking two Black prospective jurors their answers to three questions pertaining to the death penalty on a written juror questionnaire. No comparative juror analysis was conducted by the trial court. On state post-conviction review and in federal habeas proceedings, Chamberlin demonstrated that a white prospective juror gave identical answers but was affirmatively accepted by the prosecutor. The Mississippi Attorney General argued that the white prospective juror gave a different response on the questionnaire that was more favorable to the State than the stricken Black panelists' responses to that question, even though the prosecutor made no reference to that question at trial.

The federal district court granted relief, and a panel of the Fifth Circuit affirmed, explaining that this Court's precedent requires the State to stand or fall on the plausibility of the reasons proffered by the trial prosecutor. On en banc review, the Fifth Circuit reversed, discounting the comparative juror analysis presented by Chamberlin based on the post-hoc reasoning of an attorney who did not try the case. This case thus presents the following questions for review:

1. Whether a court reviewing a *Batson* claim may consider reasons distinguishing stricken jurors from those accepted by the prosecutor when the distinguishing factor was not cited in the trial court as a basis for the prosecutor's decision?

2. Whether the evidence in the state court record, including the prosecutor's starkly disparate strike pattern, failure to conduct individual voir dire, and the comparative juror analysis showing the implausibility of the prosecutor's proffered reasons for striking two Black panelists, supported the federal district court's grant of habeas relief.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Lisa Jo Chamberlin is the Petitioner in this case and was represented in the Court below by Elizabeth Carlyle, Alicia Kate Margolis and Michael Bentley.

Marshall Fisher, Commissioner, Mississippi Department of Corrections, is the Respondent and was represented in the court below by the Mississippi Attorney General's Office and Assistant Attorney General Cameron Benton.[1]

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

[1] Since the filing of the case in the Fifth Circuit, Fisher has been replaced as commissioner by Pelicia E. Hall.

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Petitioner Lisa Jo Chamberlin prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in *Chamberlin v. Fisher*, Case No. 15-70012, decided March 20, 2018.

OPINIONS BELOW

The opinion of the en banc court is printed at Appendix (hereinafter "App.") 1a-39a, and is reported at 885 F.3d 823. The opinion of the Fifth Circuit panel is printed at App. 40a-64a, and is reported at 855 F.3d 657. The memorandum and order of the U.S. District Court for the Southern District of Mississippi is printed at App. 65a-103a. The opinion of the Mississippi Supreme Court affirming Chamberlin's conviction and sentence on direct appeal is printed at App. 104a-153a and reported at 989 So.2d 320. The opinion of the Mississippi Supreme Court denying post-conviction relief is printed at. App. 154a-173a and reported at 55 So.3d 1046. The order of the Fifth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at 174a-175a.

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on March 20, 2018, denying Chamberlin's petition for writ of habeas corpus. *See* App. 1a. That court denied a timely petition for rehearing on May 7, 2018. App. p. 174a. On August 1, 2018, Justice Alito granted Chamberlin's motion

for extension of time to file the petition for writ of certiorari and ordered that it be filed on or before October 4, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In separate trials, juries convicted Petitioner Lisa Jo Chamberlin and her boyfriend, Roger Gillett, of two counts of capital murder for brutally killing Vernon Hulitt and Linda Heintzelman after a dispute about damages for a car accident they had all been involved in. Chamberlin and Gillett were both initially sentenced to death, but the Mississippi Supreme Court subsequently vacated Gillett's sentence, and he has now been resentenced to life without parole.

As Judge Costa of the Court of Appeals for the Fifth Circuit recognized in this case, "[e]ven for the most horrific crimes with the most culpable defendants, there are certain trial errors that are deemed structural and require automatic reversal." App. p. 48a. This case involves one such structural error. At every stage of her court proceedings, Chamberlin has contended that the prosecution discriminated against Black prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The federal district court agreed and held that the state courts' contrary rulings were unreasonable within the meaning of 28 U.S.C. § 2254(d). In so doing, the court relied on a comparative juror analysis, which showed that the

only reason the prosecutor proffered at trial for striking two Black panelists applied equally to a white panelists, whom the prosecutor did not strike.

A panel of the Fifth Circuit affirmed, but a divided en banc court reversed. The majority discounted this juror comparison by allowing Mississippi to present a new reason—which the prosecutor did not proffer at trial—for distinguishing between the Black panelists who were peremptorily struck, and the white panelist who was not. Judge Costa, joined by four other judges, explained that the majority's reliance on this post-hoc justification repeated an error the Fifth Circuit had made in *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004), *reversed* 545 U.S. 231 (2005). Chamberlin now seeks this Court's review.

A. At trial, the prosecutor engaged in a pattern of discretionary strikes against Black prospective jurors.

Before trial, all of the prospective jurors completed jury questionnaires, and the responses were available to the attorneys prior to voir dire. Voir dire lasted a full day, and each side had the opportunity to ask the prospective jurors individually about their responses to the questionnaire and to the questions asked in court. Then, the prosecutors and defense counsel had a night to consider their challenges for cause and peremptory strikes.

The jury venire available for peremptory strikes was comprised of 42 jurors, 13 of whom (31%) were Black. Jury selection then worked as follows: The

prosecutors went through the list of qualified prospective jurors in order, and "tendered" the first twelve jurors they accepted. Then, defense counsel exercised strikes against the jurors tendered by the prosecutors, and the prosecutors tendered additional jurors. The process continued, back and forth, until 12 jurors were selected, each affirmatively accepted by the prosecutors.

The prosecutors struck the first two Black panelists and accepted eleven of the first twelve white panelists, leaving a panel of eleven whites and one Black juror. Defense counsel objected under *Batson*, but the trial court stated, "I don't think two strikes is a pattern," and declined to require the prosecutors to provide reasons for the strikes.

After the defense counsel announced their strikes from this panel, the prosecutors struck the next five Black prospective jurors, including Thomas Sturgis (juror no. 104) and David Minor (juror no. 106). Defense counsel repeatedly renewed his objection that the prosecutors were striking Black prospective jurors because of their race. After the strike of Sturgis, the trial court said, "Okay. And we'll come back to that." The prosecutors then accepted two Black jurors, but one of those non-strikes was accidental, as the prosecutors incorrectly thought the prospective juror had already been struck for cause.

Ultimately, even with this accidental non-strike of one Black juror, the prosecutors used 62% of their peremptory strikes (eight of thirteen) to remove

Black prospective jurors. A Black panelist was over seven times more likely to be struck by the prosecutors than a white panelist. The jury that was seated had ten white jurors and two Black jurors, and both alternate jurors were white.

At the end of the strike process, defense counsel renewed his objection to the prosecutors' peremptorily striking Black panelists. Without making a finding as to whether the defense had made a prima facie case of discrimination under *Batson* step 1, the trial court asked the lead prosecutor his reasons for the challenged strikes. Each of the prosecutor's proffered reasons was based solely on the prospective jurors' responses to the jury questionnaire, with no references to any voir dire responses. Indeed, although the prosecutor had questioned several white panelists individually about their death penalty views during voir dire, he did not question any Black panelists on this topic.

As to Sturgis and Minor, the prosecutor cited only their answers to questions 30, 34, and 35 as justifications for the strikes. These answers, respectively, indicated that Sturgis and Minor were "not sure" if they were emotionally capable of announcing a verdict of death; "not sure" if they would hold the State to a higher burden of proof than the law requires given that it was a death penalty case; and would want to be 100% certain of the defendant's guilt before finding her guilty.

Defense counsel argued that these reasons were pretextual because of Sturgis's and Minor's other pro-prosecution characteristics. Defense counsel stressed that, in response to another question on the questionnaire (number 53), Sturgis stated that he "generally favors the death penalty." Defense counsel further emphasized that the prosecution had "accepted other jurors with law enforcement connections," but it struck Minor even though he had such connections. Minor's deceased brother had been a Vicksburg policeman and his nephew worked for the Mississippi State Highway Patrol; Minor himself had worked for the Vicksburg Fire Department for 28 years. Finally, defense counsel emphasized that the prosecutor had not conducted any individual voir dire of Sturgis, Minor, or several other Black panelists whom the prosecutor peremptorily struck.

The trial court overruled the *Batson* objections, finding the prosecutor's proffered reasons "race neutral." The questionnaires for all prospective jurors were before the trial court, but no party addressed the fact that the prosecutors accepted a white juror, Brannon Cooper, even though he answered questions 30, 34, and 35 identically to Sturgis and Minor.

B. Direct Appeal

On direct appeal, the Mississippi Supreme Court summarily held that defense counsel failed to rebut the prosecutor's race-neutral reasons for striking Sturgis and Minor. App. 135a. The state supreme court did not address defense

counsel's arguments that the strikes were pretextual in light of Minor's law enforcement connections, Sturgis's support for the death penalty, and the prosecutor's failure to conduct individual voir dire. Neither appellate counsel nor the supreme court conducted a comparative juror analysis with respect to the identical answers provided by Cooper (the white panelist accepted by the prosecutors), Sturgis and Minor to questions 30, 34 and 35.

C. Post-conviction Review

Chamberlin sought post-conviction relief in the Mississippi Supreme Court, presenting a comparative juror analysis as part of an ineffective assistance of counsel claim, which showed that Cooper gave the same answers as Sturgis and Minor to questions 30, 34, and 35.

The supreme court did not address this comparison or discuss any particular Black panelist. Instead, the Mississippi Supreme Court held there was no evidence of pretext because "at least one" of the white panelists' answers on the questionnaire was not identical to the answer provided by the Black panelists struck by the prosecutors:

> [A] thorough review of the record in this case, including the jury questionnaires provided by Chamberlin, discloses that each of the African-American jurors struck had at least one response in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the State. Therefore, we are unable to find disparate treatment of the struck jurors.

App. 167a.

D. The district court held that comparative juror analysis supported a finding of pretext, and that the state courts' contrary finding was unreasonable.

Chamberlin's petition for writ of habeas corpus contended that the prosecutors' racial discrimination in jury selection violated *Batson*, and that the state courts' contrary rulings were legally and factually unreasonable under 28 U.S.C. § 2254(d). The district court agreed. App. 104a.

The district court found that a side-by-side comparison of Sturgis and Minor with white panelist Cooper showed that the three men gave identical answers to the questions cited by the prosecutor as his reasons for striking Sturgis and Minor. Mississippi sought to overcome that comparison by noting that, in response to question 53, Cooper had circled that he "strongly favor[ed]" the death penalty and added by hand "for rape, murder, child abuse, and spousal abuse." Mississippi argued that this answer showed Cooper supported the death penalty more strongly than Sturgis or Minor. But the prosecutor made no reference to this question at trial. In fact, it was defense counsel who referred (implicitly) to question 53. In contending that the prosecutor's proffered reason for striking Sturgis was pretextual, defense counsel emphasized that Sturgis stated he "generally favor[ed]" the death penalty, but the prosecutor struck him without even conducting any individual voir dire.

Noting this Court's admonition in *Miller-El v. Dretke*, 545 U.S. 231 (2005) *l* against the consideration of post-hoc reasons not cited by the prosecutor at trial, the district court explained that Mississippi's new reason could not be considered. The court observed that the prosecutor said nothing about question 53, "despite the fact that he had several chances to augment the record on that score." App. 85a. Indeed, "[a]fter defense counsel had argued that the reasons given to strike Sturgis and Minor appeared to be racially motivated, the trial court asked for further argument, and the prosecutor responded, 'None other than what we made . . . .'" *Id.*

The district court also pointed out that, even if his answer to question 53 would in hindsight make Cooper appear favorable to the prosecution, Cooper also answered other questions in ways that would appear to make him *less* favorable to the prosecution than Sturgis and Minor. Specifically, while Sturgis and Minor had family connections to law enforcement, "Cooper had no such ties." App. 99a.[2] Cooper also had an arrest record, while Sturgis and Minor had none. Otherwise, the district court found it "remarkable just how similar these three jurors were in their experiences: each obtained education beyond high school; each was employed; [none] had any military experience; each read the Vicksburg Post daily;

[2] On his questionnaire, Sturgis responded "yes" to a question asking whether a relative had worked for either a law enforcement agency, correctional facility, or mental health facility, adding that his brother had done so in Chicago and Jackson, Mississippi.

each watched television regularly; and fishing was among their hobbies." App. 100a n.7.

E. The Fifth Circuit, *en banc*, held that the State Attorney General's new reason for the prosecutor's strikes of two Black prospective jurors defeated Chamberlin's *Batson* claim.

A divided panel of the Fifth Circuit affirmed. The panel concluded that it did not need to address 28 U.S.C. § 2254(d)(1) because the state courts' rejection of Chamberlin's *Batson* claim constituted an unreasonable determination of the facts under § 2254(d)(2).

The panel majority began by discussing the prosecutor's pattern of strikes in this case, which "while not dispositive, is compelling evidence of intentional discrimination." App. 52a. Not only was the prosecution more likely to strike Black panelists than their white counterparts, the "sequence of the strikes is also telling." *Id*. The prosecution "used the vast majority of its early strikes against black jurors," and "only later—after defense counsel's repeated objections and when it was running out of strikes—accepted the two black jurors who ended up on the jury (the second in a moment of confusion when the prosecutor believed the juror had already been struck)." App. 52a-53a.

The panel majority then turned to the comparison between Sturgis and Minor (the struck Black panelists) and Cooper (the white panelist accepted by the prosecutors). The panel explained that this comparison was properly considered as

part of the § 2254(d)(2) analysis under *Miller-El* because the record was fully before the trial court even though no party had specifically raised the comparison at trial. And that comparison, the panel explained, is powerful evidence of pretext. Indeed, it is even more significant than the comparative juror analysis in *Miller-El* because the "jurors 'identical in all respects' that *Miller-El* [] thought unlikely exist here. Every reason the prosecutor identified for excluding Sturgis and Minor applied to Cooper, the white juror who was not struck." App. 54a.

In dissent, Judge Clement relied on Mississippi's new argument that Cooper should be distinguished from Sturgis and Minor because of their different responses to question 53. App. 60a. The panel majority explained that Judge Clement's approach was inconsistent with *Miller-El*, which "rejected prosecutors' ability to justify their strikes based on reasons not offered during jury selection and appellate courts' ability to come up with new rationales on prosecutors' behalf." App. 54a.

The Fifth Circuit then voted to hear the case *en banc* and reversed. Writing for the en banc majority, Judge Clement held that the district court's comparison of Sturgis and Minor with Cooper was "erroneous" because it failed to consider differences between the comparators not cited by the prosecutor at trial. App. 15a. According to the Fifth Circuit, this Court's admonition in *Miller-El* that the State must "stand or fall" on the prosecutor's contemporaneous reasons for a strike

applies only when the State offers new reasons for striking a Black juror. App. 16a. The Fifth Circuit determined that question 53 was actually a new reason for keeping Cooper, rather than a new reason for striking Sturgis and Minor. The Fifth Circuit concluded the prosecution's reasons for striking a Black juror and its reasons for keeping a white juror are "entirely different question[s]." App. 17a.

Judge Costa, joined by Judges Stewart, Davis, Dennis, and Prado, dissented. In Judge Costa's view, the "[r]evealing pattern of discriminatory strikes," the disproportionate number of strikes of Black prospective jurors, and the analysis of the comparator's answers to the questions cited by the prosecutor at trial, together presented a strong case of pretext. App. 24a. Moreover, the dissent explained that *Miller-El* prohibits any post-hoc justification for distinguishing between accepted and excluded jurors, whether it is characterized as a new reason for striking a Black panelist or a new reason for keeping a white one.

The dissent stressed that "of the hundreds of *Batson* decisions" in the Fifth Circuit, the only two that "ever found that a strike was a discriminatory" relied on comparative juror analysis. App. 21a. Judge Costa explained that the en banc majority opinion "saps most of the force out of this one tool that has ever resulted in [the court] finding a *Batson* violation" by permitting the "substitution of a reason" for a strike not offered at trial, contrary to *Miller El*. *Id*. The dissent pointed out that the Fifth Circuit had "been down this road before" being reversed

by this Court in *Miller-El*, and lamented: "It is one thing to make a mistake; it is quite another to not learn from it." App. 22a-23a.

REASONS FOR GRANTING THE WRIT

The principal question raised by this petition is whether a reviewing court considering a *Batson* claim may consider justifications for distinguishing excluded from accepted jurors that the prosecutor did not proffer at trial. This Court has already answered that question, and the answer is no.

In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court emphasized the importance of comparative juror analysis in finding that the prosecution violated *Batson*, and holding that the state courts' contrary rulings constituted an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). The Court explained that the prosecution's proffered reasons for striking two Black panelists applied with equal force to white jurors whom the prosecution did not strike, which was powerful evidence that the proffered reasons were pretextual. *See* 545 U.S. at 241-53. In so doing, the Court rejected arguments (which had been embraced by the Fifth Circuit) that there were other reasons why the white comparators would have been more favorable to the prosecution. This Court explained that those justifications were irrelevant because they were "reasons the prosecution itself did not offer." *Id*. at 245 n.4.

In the decision below, a sharply divided en banc Fifth Circuit repeated the mistake it made in *Miller-El*. At Chamberlin's trial, the prosecutors disproportionately struck Black panelists, failed to conduct any individual voir dire of struck Black panelists, and struck Black panelists with law enforcement connections (including Minor and apparently Sturgis), and who generally favored the death penalty (Sturgis). When called upon to provide reasons for the strikes, the prosecutor referred solely to Sturgis's and Minor's answers to questions 30, 34 and 35 on the jury questionnaire. But a prospective white juror provided the very same answers to those questions yet was accepted by the prosecutors.

Rejecting the district court's grant of habeas corpus relief, the Fifth Circuit allowed Mississippi to offer a new reason—one not asserted by the prosecutor at trial—as to why the white panelist was more favorable to the prosecution. The Fifth Circuit insisted that *Miller-El* prohibits the State from offering a new reason for excluding a Black prospective juror but *does not* prohibit the State from offering a new reason why the prosecution accepted a white juror. In fact, as Judge Costa explained in dissent, *Miller-El* held both that the State may not offer new reasons for striking Black panelists and that the State may not offer new reasons for accepting white panelists. The majority failed to address this holding of *Miller-El*.

The Fifth Circuit's decision also conflicts with decisions from the Seventh and Ninth Circuits. *See United States v. Taylor*, 636 F.3d 901 (7th Cir. 2011); *Love v. Cate*, 449 F. App'x 570 (9th Cir. 2011). Those circuits faithfully apply *Miller-El* and hold that a reviewing court is forbidden from considering justifications for keeping a white juror but striking a comparable Black prospective juror when those justifications were not presented at trial. The dissent noted that the majority decision conflicted with precedent from these circuits. *See* App. 30a (Costa, J., dissenting). The majority ignored the conflicting Ninth Circuit case, and summarily, but unpersuasively, tried to distinguish the Seventh Circuit decision. App. 38a. The decision below also conflicts with a pre-*Miller-El* decision from the Missouri Supreme Court, which also rejected the State's effort to defend against a *Batson* claim by presenting post-hoc justifications for keeping white panelists. *State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002) (en banc).

In sum, the decision below conflicts with the precedent of this Court and that of at least two other circuits as well as a state court of last resort. And the issue is undeniably important. Racial discrimination in jury selection is a recurring and persistent evil that undermines public confidence in the rule of law. Certiorari is warranted. *See* Sup. Ct. R. 10(a), (c).

I. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT ON AN IMPORTANT ISSUE OF FEDERAL LAW.

For almost 140 years, this Court has struggled to remedy the epidemic of discrimination against Black Americans and other racial minorities in jury selection. *See Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). The harms from this pervasive discrimination are severe and well-known. "Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'" *Miller-El*, 545 U.S. at 237-38 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)). Moreover, "'when the government's choice of jurors is tainted with racial bias, that 'overt wrong'" undermines public confidence in the rule of law. *Id*. at 238 (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)). "That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." *Id*. (quoting *Powers*, 499 U.S. at 412).

For these reasons, racial bias in jury selection is unconstitutional no matter the race of the defendant, and "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." *Powers*, 499 U.S. at 416. A white defendant whose jury is infected by discrimination against Black jurors

"suffers a serious injury in fact because discrimination at the *voir dire* stage 'casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt.'" *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (quoting *Powers*, 499 U.S. at 411) (additional quotation marks and alteration omitted). The harms to the excluded jurors, and to public confidence in the rule of law, are also the same regardless of the race of the defendant. *See Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992).

Discrimination in jury selection has persisted despite this Court's "'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).[3] That is in part because of "the practical difficulty of ferreting

[3] Summarizing statistics regarding jury discrimination, a 2012 Mississippi Law Journal article explained:

> Studies of jury-selection patterns reveal shocking disparities in prosecutorial use of peremptory challenges against white and minority prospective jurors. In Jefferson Parish, Louisiana, between 1994 and 2002, prosecutors challenged more than fifty-five percent of African American veniremembers but less than seventeen percent of white veniremembers. Between 2005 and 2009, in Houston County, Alabama, which is twenty-seven percent African American, prosecutors used peremptory challenges to eliminate eighty percent of African American veniremembers so that the resulting juries were either all white or had only one African American member. Exclusion of African Americans is not confined to the South. In Philadelphia, between 1981 and 1997, prosecutors in capital murder cases challenged fifty-one percent of African American veniremembers but only twenty-six percent of white veniremembers.

Joshua C. Polster, *From Proving Pretext To Proving Discrimination: The Real Lesson Of Miller-El And Snyder*, 81 MISS. L. J. 491, 502 (2012) (citations omitted).

out discrimination in selections discretionary by nature." *Miller-El*, 545 U.S. at 238.

This case concerns one critical tool for ferreting out such discrimination—comparative juror analysis—and the Fifth Circuit's failure to apply this Court's precedent with respect to that analysis.

A. The decision below contradicts *Miller-El* because it distinguishes between panelists based on reasons the prosecutor did not proffer at trial.

As the Court explained in *Miller-El*, comparative juror analysis is a "powerful" tool for uncovering racial discrimination in jury selection. *Id*. at 241. The premise of comparative juror analysis is straightforward. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id*.

To be effective, comparative juror analysis must be limited to assessing the plausibility of the reasons the prosecutor proffers at trial. *Id*. If the prosecutor's proffered reason for excluding a Black prospective juror "does not hold up" because it applied with equal force to a white prospective juror the prosecutor did not exclude, the "pretextual significance does not fade because" an appellate judge or counsel for the State in post-conviction proceedings "can imagine a reason that that might not have been shown up as false." *Id*. at 252.

In this case, it is undisputed that the reason proffered by the prosecutor at trial for striking two Black panelists applied equally to a white panelist whom the prosecution did not strike. At trial, the prosecutor stated that he was striking Black panelists Sturgis and Minor because of their answers to questions 30, 34, and 35 on the jury questionnaire. App. 49a. In those answers, Sturgis and Minor: (1) stated they were "not sure" if they were emotionally capable of announcing a verdict of death; (2) stated they were "not sure" if they would hold the State to a higher burden of proof because it was a capital case; and (3) said "yes" that, because it was a capital case, they would want to be 100% certain before finding the defendant guilty. *Id*. But the prosecutor did not strike a white panelist, Cooper, even though Cooper provided the same answers to each of these questions. *Id*. Under *Miller-El*, the prosecutor's failure to strike Cooper is "powerful" evidence that his proffered reason for striking Sturgis and Minor was pretextual. 545 U.S. at 241.

Indeed, the juror comparison is even more powerful here than it was in *Miller-El*. In *Miller-El*, the prosecutor proffered two reasons for striking each of the Black panelists in question, and the non-Black comparators were similarly-situated with respect to only one of those reasons. *See* 545 U.S at 246, 250 n.8. Nonetheless, the Court explained that jurors are not "cookie cutters," and the "strong similarities" between the Black and white panelists meant the comparison

was probative of pretext. *Id*. at 247 & n.6. In dissent, Justice Thomas contended that prospective jurors are "similarly situated" for this kind of comparative analysis only if they match all of the reasons the "prosecution gave for striking a potential juror." *Id.* at 291. Here, the excluded Black panelists, and the non-excluded white panelist, are "similarly situated" even under Justice Thomas's more exacting standard because they "match" with respect to the only reasons the prosecutor offered for the strike.

Still, the Fifth Circuit held that the comparison between identically-situated Black and white panelists in this case was not probative of pretext. It did so by accepting Mississippi's new explanation that there was a different reason why Cooper (the white panelist) would have been a more favorable juror for the prosecution than Sturgis and Minor (the excluded Black panelists). Specifically, the en banc majority noted that Cooper circled "Strongly Favor" in describing his opinion about the death penalty in response to question 53 of the jury questionnaire, adding notations referencing specific crimes in the margin, whereas Sturgis circled "Generally Favor," and Minor circled "No Opinion." *See* App. 15a.

The Fifth Circuit ruled that this post-hoc justification was acceptable because it was a new reason for keeping Cooper, not a new reason for striking Sturgis or Minor. According to the Fifth Circuit, there is a "crucial difference between asserting a new reason for *striking* one juror and an explanation for

keeping another." App. 16a (emphasis in original). In the Fifth Circuit's view, *Miller-El* does not allow the State to offer new reasons for striking a juror, but *Miller-El*'s prohibition on post-hoc justifications "is not implicated" when the State asserts a new explanation for keeping a juror. *Id.*

As Judge Costa explained in dissent, this effort to distinguish between new reasons for striking a prospective Black juror and new reasons for keeping a white one is untenable, as they are "just the other side of the same coin." App. 28a. Here, "[i]f the difference between the three was question 53, that would mean Sturgis and Minor were struck not only because of their answers to questions 30, 34, and 35, but also because of their more lukewarm support of the death penalty conveyed in response to question 53." *Id.* But the prosecutor did not cite the responses of Minor and Sturgis to question 53 as one of *his* reasons for striking those Black panelists.

Most important, the Fifth Circuit's attempted distinction is foreclosed by *Miller-El*. In *Miller-El*, this Court rejected both post-hoc justifications framed as "new reason[s] for *striking*" Black panelists and post-hoc justifications framed as new "explanation[s] for *keeping*" white panelists. The Fifth Circuit majority simply ignored the portion of *Miller-El* refusing to consider new justifications for keeping white jurors. And it did so even though Judge Costa specifically pointed to that part of *Miller-El*. *See* App. 28a-29a.

This Court's comparative juror analysis in *Miller-El* focused on two excluded Black panelists, Billy Jean Fields and Joe Warren. *See* 545 U.S. at 241-52. For Warren, the Court rejected a post-hoc justification that Warren was excluded because of his "general ambivalence about the death penalty," when the prosecutor said at the time that he was striking Warren because of his statements that "'the death penalty was an easy way out.'" *Id*. at 248-49; *see id.* at 252-53. In the decision below, the Fifth Circuit cited only the portion *Miller-El* addressing Warren. *See* App. 15a-16a. From this, the Fifth Circuit concluded that *Miller-El* has a "narrow focus," and was "careful to limit" its prohibition on post-hoc justifications to reasons a prosecutor gives for "striking a juror." App. 16a (alterations and emphases omitted).

But the Fifth Circuit never addressed *Miller-El*'s comparative juror analysis with respect to Fields (the other excluded Black panelist). And, in that portion of its opinion, this Court held the prohibition on post-hoc justifications applies just as forcefully to new explanations for keeping white panelists as it does to new reasons for striking Black panelists. *See* 545 U.S. at 245 n.4.

The prosecutor's proffered reason for striking Fields was that Fields had expressed concerns about sentencing someone to death if the person could be rehabilitated. *See* 545 U.S. at 243. Relying on comparative juror analysis, this Court found that justification pretextual (even applying § 2254(d)(2)). The Court

explained that, if the prosecutor had genuinely been concerned about Fields's statements related to rehabilitation, he "should have worried about a number of white panel members he accepted"—in particular, Sandra Hearn and Mary Witt. *Id*. at 244.

In dissent, Justice Thomas contended that Hearn and Witt were not appropriate comparators based on the very reasoning embraced by the Fifth Circuit in this case. Justice Thomas offered two new reasons for keeping Hearn: (a) "Hearn was adamant about the value of the death penalty for callous crimes"; and (b) "Hearn's father was a special agent for the Federal Bureau of Investigation, and her job put her in daily contact with police officers for whom she expressed the utmost admiration." 545 U.S. at 294. Texas had made those same arguments with respect to Hearn, and they had been accepted by the Fifth Circuit. *See* 361 F.3d at 858 (Fifth Circuit opinion); Brief for Respondent at 19-21, *Miller-El v. Dretke*, 545 U.S. 231 (2005) (No. 03-9659), 2004 WL 2446199.

Notably, the first new reason for accepting Hearn is identical to the new reason offered by Mississippi in this case for accepting Cooper: in both cases, the State pointed to other statements by the panelist—including on the juror questionnaire—as evidence that the white panelist strongly supported the death penalty and was therefore prosecution-friendly. Brief for Respondent at 19-21, *Miller-El v. Dretke*, 545 U.S. 231 (2005) (No. 03-9659), 2004 WL 2446199.

Justice Thomas was also unequivocal in framing these as new reasons why the prosecution would have kept Hearn: "[t]his is likely why the State accepted Hearn, and Miller-El challenged her for cause." 545 U.S. at 294.

Similarly, for Mary Witt, Justice Thomas emphasized that "Witt expressed strong support for the death penalty," including by making statements suggesting the death penalty was appropriate under the circumstances of Miller-El's case. Again, Justice Thomas offered this as a new reason the prosecutor kept Witt: "This is likely why the State accepted Witt and Miller-El struck her." *Id*. at 295.[4]

The *Miller-El* majority, however, rejected as irrelevant these new reasons why a theoretical prosecutor may have wanted to keep Hearn and Witt. The majority explained that what mattered was that Hearn's and Witt's views on rehabilitation were similar to Fields's, thereby showing that the prosecutor's stated concern about Fields's views on that subject was pretextual. *See* 545 U.S. at 244. In a footnote, the Court then explained: "The dissent offers other reasons why these nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was." 545 U.S. at 245 n.4. This Court held that these new reasons could not be considered: "In doing so, the dissent focuses on reasons the prosecution itself did not offer. *See infra*, at 2332." *Id*.

[4] Similar to *Miller-El*, here defense counsel peremptorily struck Cooper (the white comparator).

The "*infra*" reference in this quote is to the *Miller-El* Court's comparative juror analysis for Warren (the other excluded Black panelist). *See* 545 U.S. at 252; 125 S. Ct. at 2332. Specifically, it is a reference to the portion of the Court's opinion announcing the requirement that the State must "stand or fall" on the prosecution's contemporaneous reasons for a strike: "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives," and "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Id*.

Thus, in footnote 4, *Miller-El* held that the prohibition on considering "reasons the prosecution itself did not offer," applies whether the new reason is a reason for striking a Black panelist or a new reason for keeping a white one. 545 U.S. at 245 n.4. In support, the majority relied on the very portion of its opinion (including the "stand or fall" requirement) that the Fifth Circuit here incorrectly thought applied only to new reasons for striking Black panelists, and not to new reasons for accepting white panelists. *See id*. (*infra* at 2332 cite).

In the decision below, the Fifth Circuit also invoked *Snyder v. Louisiana*, 552 U.S. 472 (2008), but *Snyder* is consistent with *Miller-El*. In *Snyder*, this Court explained that a court conducting comparative juror analysis must be careful to

ensure that prospective jurors were "really comparable" with respect to the "shared characteristic" that the prosecution proffers as a basis for striking a juror at trial. 552 U.S. at 483. But, once the record demonstrates that jurors are comparable with respect to that characteristic—in *Snyder*, it was concerns about conflicting obligations, here, it is the answers to questions 30, 34, and 35—the State may not offer *other* characteristics that the prosecution did not refer to at trial as the basis for a strike. Thus, in *Snyder*, "the Court found a *Batson* violation based on a comparative juror analysis never raised in state court, focusing only on the reasons the prosecutor contemporaneously gave." App. 33a (Costa, J., dissenting) (citing *Snyder*, 552 U.S. at 485-86). *Snyder* thus confirms *Miller-El*'s approach to comparative juror analysis; it certainly does not overrule *Miller-El*.

Because the decision below squarely conflicts with this Court's decision in *Miller-El* on an important issue of federal law, this Court should grant certiorari. *See* Sup. Ct. 10(c).

B. The Fifth Circuit's concerns about unfairness to the prosecution are misplaced and cannot be grounds for disregarding this Court's precedent.

After misreading *Miller-El*, the Fifth Circuit turned to explaining why it thought the State *should* be allowed to present new reasons for keeping jurors that the prosecutor did not raise at trial. *See* App. 16a-18a. The Court of Appeals thought that it would create an unfair asymmetry for the State to be held to the

reasons the prosecutor offers at trial, while the defendant is permitted to wait until after trial to obtain the benefit of a comparative juror analysis. *See* App. 17a-18a. But, as Judge Costa pointed out in dissent, "[w]hatever the soundness of this complaint, it is rejected by" this Court's precedent. App. 34a. This Court has squarely held both that comparative juror analysis may be undertaken for the first time after trial (and indeed on federal habeas review), and that the State may not offer reasons for either striking or keeping jurors that the prosecution did not offer at trial. *See Miller-El*, 545 U.S. at 241 n.2, 245 n.4, 252. The Fifth Circuit may not disregard this Court's precedent because it disagrees with it.

In any event, *Miller-El*'s approach to comparative juror analysis is essential to ferreting out racial discrimination in jury selection, and therefore to making *Batson* meaningful. It does not place an unfair burden on the State.

Batson is one of this Court's most important decisions seeking to fulfill its promise to eradicate racial discrimination in jury selection. In *Batson*, this Court abandoned the requirement from *Swain v. Alabama* that a defendant show an extended pattern of discrimination in "case after case." 380 U.S. 202, 223 (1965). *Batson* recognized that *Swain* had "imposed a 'crippling burden of proof' that left prosecutors' use of peremptories 'largely immune from constitutional scrutiny.'" *Miller El*, 545 U.S. at 239 (quoting *Batson*, 476 U.S. at 92-93). Under *Batson*, the defendant can rely on evidence from her own case if it creates an inference of

discrimination, which shifts the burden to the prosecutor to proffer race-neutral reasons for the strikes. *Batson*, 476 U.S. at 96-97.

However, as the Court recognized in *Miller-El*, "*Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give." 545 U.S. at 239-40. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Id*. at 240. This is why *Miller-El*'s prohibition on post-hoc justifications is essential. If the State can create new explanations for keeping certain jurors and striking others years after trial, it would be almost impossible to assess whether the reasons the prosecutor actually provided at trial were pretextual.

The Court in *Miller-El* acknowledged that it may sometimes be difficult for prosecutors to provide contemporaneous reasons for a strike. It recognized that "peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is." *Id.* at 252 (internal citation omitted). But, the Court explained, the overriding importance of ferreting out racial discrimination in jury selection meant the prosecution had to do the best it could, and then rest on those reasons: "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id*.

This "stand or fall" rule is not unfair to the State, and it has not led to a rash of decisions finding *Batson* violations based on weak evidence. On the contrary, as Judge Costa pointed out below, "[i]t appears that only two of the hundreds of *Batson* decisions in our circuit have ever found that a strike was discriminatory." App. 20a.[5] Indeed, this rule is not even implicated at all unless the defendant first makes a *Batson* motion supported by sufficient evidence to raise a prima facie case of discrimination, because the prosecutor is not required to proffer any reasons for its strikes unless the defendant has presented such evidence. *See* App. 34a (Costa, J., dissenting).

Here, the *prima facie* case was powerful. At Chamberlin's trial, the prosecution struck seven of the first eight Black venire members it considered, whereas it accepted eleven of the first twelve whites it considered. Only after the defense raised *Batson* objections and the prosecution ran out of strikes did the prosecution accept the two Black panelists who served on the jury—and one of them was accepted only out of confusion, as the prosecutor believed the juror had already been struck. App. 21a-22a. "Even including those late, post-objection

[5] Studying *Batson* cases from many jurisdictions, Stephen B. Bright and Katherine Chamblee conclude that "courts frequently refuse to meaningfully assess intent in the way *Batson*'s step three requires. The challenges in proving intent, when combined with a cursory approach to step three, make it all too easy for courts to avoid upending convictions while condemning prosecutors for discriminating . . . ." Stephen B. Bright, Katherine Chamblee, *Litigating Race Discrimination under Batson v. Kentucky*, 32 CRIM. JUST. 10, 11 (2017).

decisions, the overall numbers evince discrimination." App. 22a (Costa, J., dissenting). The prosecutors were seven times more likely to strike a prospective Black juror than a white one. *Id*. "'Happenstance is unlikely to produce this disparity.'" *Miller-El*, 545 U.S. at 241 (citation omitted). Indeed, as Judge Costa explained, "the random chance that so many blacks would be struck is a remote 1 in 100." App. 23a.

When, as here, a defendant presents such evidence raising an inference of discrimination, prosecutors must proffer reasons for their strikes. *Miller-El* then allows an appellate or post-conviction court to consider the entirety of the factual record that is before the trial court in assessing the plausibility of those reasons. *See* 545 U.S. at 241 n.2. That makes sense. *Batson* is about the prosecutor's motives at trial, and if the record before the trial court shows that the prosecutor's stated reason for striking a juror was pretextual, that is powerful evidence that the prosecutor had a discriminatory motive.

Contrary to the concerns expressed by the majority below, *see* App. 18a, this does not require prosecutors to explain their reasons for keeping every white juror. Prosecutors simply must not proffer a reason for striking a Black panelist that applies equally to a non-struck white panelist, because such a reason raises a strong inference of pretext. As Judge Costa pointed out in dissent, "If a concern about a black juror was important enough to be cited as a reason for the challenged strike,

a white juror with the same problematic characteristic should also be on the prosecutor's mind[.]" App. 34a.

In this case, there is even less cause to be concerned about the prosecutor's ability to marshal his reasons at the time an objection was made. The prosecutor did not tell the court that his strikes were based on anything the stricken Black panelists said during voir dire. Instead, he relied exclusively on the responses to the jury questionnaire. Those responses were available to both sides before the trial began. In addition, the trial court here allowed the parties an overnight recess to formulate their peremptory strikes, ensuring that the prosecutor had an opportunity to review his notes before having to explain his strikes.

Nor is comparative juror analysis the only relevant factor supporting the district court's finding of pretext here. First, the strike pattern evidence discussed above shows that the prosecution's exclusion of so many Black prospective jurors was almost surely not a coincidence. That evidence from the *prima facie* case remains relevant—and in this case it is highly significant—in the ultimate determination of pretext. *See Miller-El*, 545 U.S. at 241; *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (recognizing the significance of strike pattern evidence in the *Batson* step three analysis).

Second, the prosecutors did not conduct any voir dire of either Sturgis or Minor with respect to their purported basis for striking them—their answers to

questions 30, 34, and 35 of the voir dire transcript. Nor, for that matter, did the prosecutors engage in any voir dire with respect to question 53—the new question that supposedly distinguishes Cooper from Sturgis and Minor. Indeed, even though Sturgis apparently had law enforcement connections and said that he generally favored the death penalty, the prosecutors struck him without asking a single question. Similarly, even though Minor had law enforcement connections, the prosecutors struck him without asking a single question. And the prosecutors accepted Cooper without conducting any individual voir dire even though he had no law enforcement connections and—unlike Sturgis and Minor—had an arrest record.

As in *Miller-El*, "'[t]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" 545 U.S. at 246 (quoting *Ex Parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)). By ignoring these other indicia of discrimination, the Fifth Circuit majority created a false difficulty for the prosecutor.

* * *

In allowing Mississippi to offer new reasons distinguishing between excluded Black and accepted white panelists, the opinion below "saps most of the force out" a tool that has been crucial for unearthing racial discrimination in jury

selection. App. 20a (Costa, J., dissenting). As Judge Costa explained, "[w]hat is even more troubling is that we have been down this road before." *Id*. The decision below contravenes *Miller-El*, and, for that reason, this Court's review is warranted.

II. THE FIFTH CIRCUIT'S DECISION CREATES A SPLIT OF AUTHORITY THAT WARRANTS THIS COURT'S REVIEW.

This Court should also grant certiorari because the Fifth Circuit's decision creates a circuit split. As Judge Costa recognized in his dissent, "no other court applying *Miller-El* [] has relied on reasons beyond those given at trial when comparing jurors." App. 31a. On the contrary, other circuits have recognized that, under *Miller-El*, a prosecutor must "articulate his reasons" for a strike at the trial court, *Love v. Cate*, 449 F. App'x 570, 572-73 (9th Cir. 2011), and not "after the fact," *United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011). *Accord McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1269-70 (11th Cir. 2009); *see also Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (same analysis prior to *Miller-El v. Dretke*). *Taylor* and *Love* are directly on point. In those cases, the Seventh and Ninth Circuits applied *Miller-El*'s "stand or fall" rule to reject the government's attempt to proffer new reasons for why the prosecution kept a prospective white juror while striking a comparable Black juror.

In *Taylor*, the Seventh Circuit rejected the government's attempt to do exactly what Mississippi did here, *viz.*, scour the juror questionnaires to provide new explanations for why the prosecution kept white prospective jurors while

striking a comparable Black prospective juror. During voir dire, a Black panelist, Heshla Watson, stated that "she would not be able to impose the death penalty on a non-shooter," but that she "would follow the law as instructed and would take into account all the factors she was instructed to consider." 636 F.3d at 903. When the court asked the prosecutor to justify its peremptory strike of Watson, the "'sole reason the government supplied'" was Watson's "'views on the non-shooter issue.'" *Id.* (citation and alteration omitted).

The district court accepted that justification and denied Taylor's *Batson* motion, but the Seventh Circuit vacated and remanded to "allow the court to question the prosecutor as to why the government eliminated Watson based on the non-shooter question but chose not to challenge" white panelists who had provided similar answers on the question. *United States v. Taylor*, 277 F. App'x 610, 613 (7th Cir. 2008).

At the hearing, the government compared juror questionnaires and opined that Watson "would be less likely [than the white jurors] to favor the death penalty." *Taylor*, 636 F.3d at 904. For example, the government noted that "Watson approved of felons possessing guns so long as they had permits, while [one of the white jurors] favored stricter gun control," and "Watson had not discussed how she would weigh the defendant's background, while [one of the white jurors] said she would not consider a defendant's difficult upbringing." *Id.*

The district court found these new reasons "credible nonracial reasons for differentiating between the jurors." *Id.*

Writing for a unanimous panel, Judge Sykes reversed, holding that it was "clear error under the teaching of *Miller-El* []" for the court to accept "new, unrelated reasons extending well beyond the prosecutor's original justification for striking Watson." *Id.* at 906. *Miller-El* "instructs" that "when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, and not additional reasons offered after the fact." *Id.* at 905. And "in crediting the government's explanation for striking Watson but not [the white juror], the court looked beyond their responses to the non-shooter question and analyzed their attitudes toward gun control and how they might evaluate the defendants' backgrounds" even though "the prosecutor never tried to justify striking Watson based on her views of either issue." *Id.* at 906. The Seventh Circuit held that this was impermissible under *Miller-El* and ordered a new trial. *Id.* at 905-06.

The majority below sought to distinguish *Taylor* in a single sentence, stating that, "the Seventh Circuit blocked the prosecution's effort to raise seven new reasons for striking a juror that had not been offered before." App. 38a. But, what the majority omitted from this truncated discussion is that the government in *Taylor* attempted to justify its strike of the Black panelist by looking to the *white*

panelists' questionnaires and speculating as to why the white panelists would have been more favorable to the prosecution. *See* 636 F.3d at 905-06. That is the very same thing Mississippi has done here.

The Ninth Circuit in *Love* similarly refused to consider the State's new reasons for keeping a white juror that the prosecutor did not proffer at trial. *Love*, 449 F. App'x at 572-73. In that case, the prosecution used its first peremptory strike to remove the only Black person, Gloria McGee, from the jury. *Love v. Scribner*, 691 F. Supp. 2d 1215, 1247-48 (S.D. Cal. 2010). When justifying the strike, the prosecutor said he thought McGee "was a social worker" and that "'teachers and social workers don't make good jurors.'" *Love*, 449 F. App'x at 572. Yet "the prosecutor did not dismiss non-black veniremembers within this category." *Id.* The state trial court denied Love's *Batson* motion, reasoning that the state's "'exercise of [its] peremptory challenge as to the only African[] American juror in the entire available panel'" could not support a *Batson* challenge because it thought a pattern of strikes was required. *Love*, 691 F. Supp. 2d at 1229.

On habeas review, the Ninth Circuit held that the state court's ruling in this respect was an unreasonable application of clearly established federal constitutional law; it therefore ordered the district court to hold a hearing on whether the state struck McGee "because of her race." *Love v. Scribner*, 278 F. App'x 714, 718 (9th Cir. 2008). At the hearing, the State sought to justify striking

McGee but not striking comparable white jurors by pointing to new reasons why the white jurors "had non-racial characteristics that distinguished them from the black veniremember." *Love*, 449 F. App'x at 572. For example, the State argued for the first time that it kept a white woman on the jury despite her being a teacher because she had "'very conservative, pro-prosecution aspects of her background that [McGee] lacked.'" *Love*, 691 F. Supp. 2d at 1242-43. Finding a *Batson* violation, the district court refused to consider these new reasons, holding it was "precluded from speculating" about the prosecutor's reasons for allowing the white juror to serve while striking McGee. *Id.* at 1243.

The Ninth Circuit affirmed, ruling that because the "prosecutor never stated to the trial court" the "non-racial characteristics that distinguished [the white juror] from the black venire-member," the district court properly declined to consider them. *Love*, 449 F. App'x at 572-73. In support, the Ninth Circuit relied on the very quote from *Miller-El* the Fifth Circuit thought was inapplicable here: "when a *Batson* challenge is raised, 'a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reason he gives.'" *Id.* at 572-73 (quoting *Miller-El*, 545 U.S. at 252). The facts of *Love* are indistinguishable from the facts here, and despite the dissent's citation of the case, *see* App. 30a, the Fifth Circuit did not even address it.

In *Taylor* and *Love*, it was the trial prosecutor who proposed the new reasons at a post-trial hearing. Reasons proposed by other lawyers—as occurred in this case—are even less relevant to the trial prosecutor's state of mind at the time of the strike than reasons she proposed later.

Even before this Court decided *Miller-El*, the Supreme Court of Missouri also held that the State cannot provide new reasons to justify why the prosecutor kept a white panelist yet stuck a comparable Black panelist. In *State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002) (en banc), the Court held that the additional reasons the State gave on appeal for not striking a comparable white juror were "irrelevant" "[p]ost-hoc justifications," because the "focus of the third step [of the *Batson* inquiry] is the plausibility of the *contemporaneous* explanation."

Simply, there is no meaningful way to distinguish this case from *Taylor*, *Love*, or *Marlowe*. The Fifth Circuit's opinion creates a pronounced split amongst the circuits, and between the Fifth Circuit and the Missouri Supreme Court. The Court should grant certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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