No. 03-____

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. §§ 2254(d)(2) and (e)(1).

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals denying habeas relief (App. 3a-22a) is reported at 2004 WL 352542. The previous decision of this Court, remanding the case to the Fifth Circuit for issuance of a Certificate of Appealability (COA) and consideration of the merits (App. 23a-66a) is reported at 537 U.S. 322 (2003). The opinion of the court of appeals denying a COA is reported at 261 F.3d 445 (5th Cir. 2001). The opinion of the district court and the findings of the magistrate judge that it adopts are unreported but available in the Joint Appendix (JA) to the merits briefs filed in this Court in *Miller-El* v. *Cockrell*, No. 01-7662, at JA 942-947 and JA 898-941, respectively. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding

to the trial court (JA 832-836) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 873-879) and the second opinion of the Texas Court of Criminal Appeal (JA 873-879) are unreported. Selected excerpts from the *voir dire* transcript are included at App. 67a-68a.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment and 28 U.S.C. §§ 2254(d)(2) and (e)(1) are set forth at App. 1a-2a.

INTRODUCTION

This Court has already expended considerable time and resources attempting to correct the Fifth Circuit's begrudging approach to claims of discrimination in jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and that court's myopic application of *Batson* to this very case. In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), this Court reaffirmed *Batson's* vitality by "reviewing in some detail the extensive evidence concerning jury selection procedures" in petitioner's trial (App. 28a), concluding that petitioner had identified multiple evidentiary sources to support an inference of purposeful discrimination, and ruling that the court of appeals should have issued a COA and afforded meaningful review to petitioner's claims. This Court also provided a detailed roadmap for deciding petitioner's appeal on the merits, including clear guidance on how to evaluate the specific evidence pertaining to the determinative final step of the *Batson* inquiry: whether, despite their protestations to the contrary, the prosecutors here discriminated purposefully in excluding all but one African-American veniremember from petitioner's capital jury. App. 35a-44a.

Yet on remand, the Fifth Circuit flouted this explicit guidance, reverting instead to the same empty approach this Court specifically rejected in *Miller-El*. App. 38a (court of appeals erred by failing to "give full consideration to the substantial evidence petitioner put forth in support of his *prima facie* case" and by instead accepting "without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial"). Thus, whereas this Court in *Miller-El* specifically noted the state courts' failure even to mention the disturbing historical record of discrimination in jury selection established by the prosecutor's office (*id.* at 44a), the Fifth Circuit *again* ignored that failure and itself dismissed this sordid history as irrelevant to the ultimate issue and superseded by the state courts' finding of benign prosecutorial intent. *Id.* at 9a-10a. Whereas this Court further noted that the prosecution's use of "jury shuffles" to remove African-Americans from the front of petitioner's venire panel "raise[d] a suspicion that the State sought to exclude African-Americans from the jury" (*id.* at 43a), the Fifth Circuit dismissed this prosecutorial conduct on the irrelevant ground that petitioner's counsel, too, had used jury shuffles. *Id.* at 10a. Whereas this Court concluded that the prosecutors had engaged in disparate questioning of African-American and white jurors in petitioner's case, and faulted the Fifth Circuit for concluding otherwise (*id.* at 39a-40a), on remand the court of appeals *again* reached the contrary conclusion, this time by reciting almost *verbatim*—but without attribution—the reasoning of the lone dissenter in this Court. *Id.* at 10a-18a. And finally, despite this Court's express direction to consider these factors—history of discrimination, jury shuffles, and disparate questioning, as well as the racially disproportionate strikes themselves—in evaluating the prosecutors' credibility in denying discriminatory intent, the Fifth Circuit *again* concluded that "the credibility of the reasons is *self-evident*." *Id.* at 11a. (emphasis added).

In *Batson* itself this Court sought to make meaningful the Constitution's prohibition against intentional race discrimination in jury selection by ensuring that prosecutors'

peremptory strikes were not rendered "immune from constitutional scrutiny." 476 U.S. at 92-93. The Court recognized that if prosecutors were allowed to rebut the defendant's *prima facie* case of discrimination with general assertions of non-discriminatory motive, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race . . . 'would be but a vain and illusory requirement.'" *Id.* at 97-98 (quoting *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935)). In *Miller-El* this Court sought to give greater substance to *Batson's* promise by carefully outlining how lower courts should review circumstantial evidence of purposeful discrimination in the jury-selection context. But the Fifth Circuit here, in the face of this Court's vacatur of its prior decision and remand to consider petitioner's appeal in the light of this Court's opinion, again "accept[ed] without question the state court's evaluation." If that decision is allowed to stand, the protections this Court set forth in *Batson*, as well as the requirements of § 2254, will be but "vain and illusory," despite this Court's ruling.

It is critically important that this Court review the Fifth Circuit's decision, therefore, for three interrelated reasons. *First*, at a minimum, the Court should affirm its supervisory authority to prevent lower courts from ignoring its explicit direction regarding the proper application of this Court's precedents. *Second*, this Court should grant review to vindicate its objective in granting review the first time—to ensure that *Batson* retains meaning by providing an analytical framework for the lower courts to follow in evaluating the evidence under the three-step *Batson* inquiry. The Fifth Circuit's reaction to this Court's remand suggests that unfortunately, although the Court's initial *Miller-El* opinion painstakingly presented a clear and thorough analysis of the relevant evidentiary factors and their significance, that alone will not suffice to assure faithful implementation of *Batson* unless this Court provides a similarly exacting model of the appropriate methodology for evaluating evidence under the applicable standards of proof. *Finally*, this Court should grant review to provide similar guidance to the lower courts regarding the evaluation of evidence under 28

U.S.C. §§ 2254(d)(2) and (e)(1). This case provides a uniquely effective and important vehicle to clarify the application of these statutory provisions, because they "embod[y]" the appropriate degree of deference to trial court determinations of the ultimate question of discriminatory intent under *Batson*. App. 37a. In short, if the Fifth Circuit's uncritical rubber-stamping of the state court's determination of no purposeful discrimination in *this* case is allowed to stand, then neither the substantive protections of *Batson* nor the procedural safeguards of §§ 2254(d)(2) and (e)(1) retain meaning.

STATEMENT OF THE CASE

In 1986 petitioner Thomas Joe Miller-El—an African-American defendant—was convicted of capital murder and sentenced to death by a jury from which the prosecutors had excluded 10 of the 11 African-Americans qualified to serve by striking them peremptorily. *See* App. 23a.

After the completion of *voir dire* for jury selection, petitioner moved to strike the jury due to purposeful racial discrimination in its selection, based on the then-controlling precedent of *Swain* v. *Alabama*, 380 U.S. 202 (1965), which required petitioner to show that the "prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service." App. 25a. At the *Swain* hearing, "petitioner presented extensive evidence" of such a pattern and practice of discrimination by the Dallas County, Texas, District Attorney's office. *Id.* The trial judge, however, concluded that while racial discrimination in jury selection "'may have been done by individual prosecutors in individual cases,'" there was no evidence that indicated a "'systematic exclusion of blacks as a matter of policy by the District Attorney's office.'" *Id.* (internal citation omitted). The motion to strike was therefore denied, and petitioner was tried, found guilty, and sentenced to death.

While petitioner's appeal was pending, this Court decided *Batson* v. *Kentucky* and in so doing "established its

three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause." App. 25a. "First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." App. 25a-26a (internal citations omitted).

The Texas Court of Criminal Appeals "acknowledg[ed that] petitioner had established an inference of purposeful discrimination" under *Batson* step one, and remanded to the trial court for a *Batson* hearing. App. 26a. At this post-trial hearing, which took place "a little over two years after petitioner's jury was empaneled," the trial court admitted all of the evidence submitted at the *Swain* hearing as well as additional evidence and testimony. *Id.*

The trial court concluded, however, that petitioner's evidence failed to "even raise an inference of racial motivation in the use of the state's peremptory challenges" and therefore petitioner had failed to make out a *prima facie* case of discrimination as required under *Batson* step one. App. 26a. The court went on to conclude, however, that the State would have prevailed on steps two and three in any event, because the prosecutors "had offered credible, race-neutral explanations" for each of the 10 African-Americans excluded. *Id.* The trial court also "found 'no disparate prosecutorial examination of any of the veniremen in question'" and found "'that the primary reasons for the exercise'" of the peremptory challenges against the African-American veniremen in question was "'their reluctance to assess or reservations concerning the imposition of the death penalty.'" *Id.* (internal citation omitted). "There was no discussion of petitioner's other evidence." *Id.*

The Texas Court of Criminal Appeals denied petitioner's appeal, and this Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831 (1993). After unsuccessfully pursuing

state habeas relief, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254, raising several claims, including a claim that the prosecutors had selected his capital jury in violation of *Batson*. Although the federal magistrate judge who considered the merits of the *Batson* claim concluded that only a pattern and practice of discrimination in jury selection could explain the "appalling" statistics regarding the exclusion of African-Americans from jury service in Dallas County, he considered such evidence relevant only to whether petitioner had established a *prima facie* case, and specifically declined to consider it in deciding the ultimate question of purposeful discrimination. *See* App. 26a-27a; JA 919.

The United States District Court adopted the magistrate judge's recommendations and denied relief. App. 27a. The district court denied petitioner's application for a COA, as did the Fifth Circuit. *Id.*

This Court granted certiorari. *Miller-El* v. *Cockrell*, 534 U.S. 1122 (2002). The Court—with a lone dissent—had "no difficulty concluding that a COA should have issued." App. 38a. The Court identified two fundamental flaws in the Fifth Circuit's analysis. First, the Fifth Circuit erred by deciding the merits of the underlying constitutional claim rather than the "debatability" of that claim as is required in determining whether a COA should issue. *Id.* at 39a. Second, in addressing the merits of petitioner's claim, the Fifth Circuit erred in its analysis and evaluation of petitioner's evidence. App. 38a (court of appeals erred by failing to consider fully all of the relevant evidence including that in support of petitioner's *prima facie* case, and by accepting "without question" the state court's credibility determinations). To correct the Fifth Circuit's flawed approach, this Court set forth an analytical model for evaluating the merits of a *Batson* claim under that decision's three-step framework. Applying that model to the threshold COA question, the Court concluded that a COA should issue. *Id.*

On remand, in an opinion that literally incorporated *verbatim* (without attribution) analyses and discussions from

the dissenting opinion in this Court and from the State's brief on remand (which essentially repeated the State's unsuccessful brief in this Court), the Fifth Circuit denied relief on the merits of petitioner's *Batson* claim, concluding that petitioner "has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." App. 22a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT IGNORED THIS COURT'S EXPLICIT GUIDANCE REGARDING THE PROPER ANALYTICAL FRAMEWORK FOR EVALUATING THE MERITS OF PETITIONER'S *BATSON* CLAIM UNDER 28 U.S.C. § 2254.

The court of appeals was directed by this Court to determine whether petitioner was entitled to relief under 28 U.S.C. §§ 2254(d)(2) and (e)(1) based on his claim that the prosecution purposefully discriminated against African-Americans during his jury selection in violation of *Batson*. This Court provided specific guidance for how that analysis was to be conducted. The court of appeals paid lip service to that guidance but disregarded it in substance. As a result, it grievously misapplied the relevant standard and set a dangerous precedent.

The issue on remand focused exclusively on step three of the *Batson* inquiry. Although the state trial court had previously ruled that petitioner never established a *prima facie* case of discrimination, the State conceded before this Court that that ruling was clear error, and "there is no dispute" that petitioner has satisfied *Batson* step one. App. 35a. Because petitioner acknowledged that the State had proffered facially neutral reasons for its strikes, step two is satisfied as well. *Id.*

The remaining question, as this Court explained, is "step three: whether Miller-El 'has carried his burden of proving purposeful discrimination.'" *Id.* (quoting *Hernandez* v. *New York*, 500 U.S. 352, 359 (1991)). Because the trial court's decision on the ultimate question of purposeful discrimination is a finding of fact, it will not be overturned on

direct review unless it is clearly erroneous. App. 36a-37a. Under 28 U.S.C. § 2254, state-court fact findings are given the same deference; where § 2254 applies, this Court's "habeas jurisprudence embodies" the deference accorded to a determination under *Batson* step three on direct review. App. 37a (under § 2254(e)(1), factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, and under § 2254(d)(2), a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding).

The proper evaluation of the evidence under *Batson* step three—as explicated by this Court in *Miller-El*—therefore mirrors the proper application of the fact-evaluation standards under § 2254. This Court emphasized that the deference due such findings of fact, whether on direct review or on federal habeas, does not "imply abandonment or abdication of judicial review." App. 37a. Indeed, if the standards under §§ 2254(d)(2) and (e)(1) have any meaning, they will by definition require relief in some cases. *Id.* This is such a case.

Accordingly, in laying out the analytical framework for the Fifth Circuit to apply on remand, this Court identified two categories of evidence that the Fifth Circuit was required to consider—and to consider in its totality—in evaluating petitioner's claim: the evidence of a pattern and practice of racial discrimination in jury selection in Dallas County, and the evidence that directly related to the conduct of the prosecutors in this case. App. 28a. The Court emphasized that "[i]t goes without saying" that a proper evaluation of a claim under *Batson* step three requires an evaluation and weighing of all of this relevant evidence, including "the facts and circumstances adduced in support of the *prima facie* case." *Id.* at 37a (citing *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)).

Purportedly applying this standard on remand, the Fifth Circuit concluded that none of petitioner's evidence,

"either collectively or separately,"[1] indicated by clear and convincing evidence that the state trial court erred. App. 22a. The court of appeals failed, however, to do in substance what it professed to do in form. By refusing to give full consideration to the evidence adduced by petitioner in support of his *prima facie* case and by accepting without question the state court's credibility determinations, the court of appeals not only undermined this Court's authority but deprived *Batson* and § 2254 of meaning.

A. The Court Of Appeals Failed To Follow This Court's Direction To Consider Fully Evidence Of A Pattern And Practice Of Discrimination.

This Court held that historical evidence of racial discrimination by the District Attorney's office was clearly relevant to the ultimate question of purposeful discrimination in petitioner's jury selection, and it faulted the state courts for making "*no mention* . . . of the historical record of purposeful discrimination" in evaluating petitioner's claim. App. 44a (emphasis added). This failure heightened the concern that the state courts had erred because, even when presented with this evidence of a pattern and practice of discrimination, the trial court "somehow reasoned that there was not even the inference of discrimination to support a *prima facie* case"—a clear error that the State subsequently declined to defend. *Id.*

The Fifth Circuit on remand, however, never addressed or even acknowledged this failure by the state court. Nor

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[1] While this "collectively or separately" phraseology (which states the correct standard, *see* pp. 14, 26-27 *infra*) appears in the penultimate paragraph of the court of appeals' opinion, it is the *only* indication that suggests that the court in fact engaged in the required holistic appraisal of the evidence. Throughout its opinion, the Fifth Circuit considers one category after another of petitioner's evidence, discusses that category in isolation, and concludes that *it* does not carry petitioner's burden. Nowhere in the opinion does the court explicitly perform, or appear to perform, the "collective" analysis verbalized in the penultimate paragraph of its opinion.

did it weigh the impact of that failure on the reasonableness of the state court's ultimate determination of a lack of purposeful discrimination. That failure directly contravenes this Court's guidance: This Court explicitly identified the state court's failure in this regard—and the state court's conceded commission of clear error on step one—as raising concern over the reasonableness of the state court's determination on step three.

In addition, notwithstanding this Court's admonition that "[i]t goes without saying" that evidence adduced to support petitioner's *prima facie* case should be weighed in making the ultimate determination under *Batson* step three, the Fifth Circuit discounted the relevance of the historical evidence "because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." App. 9a-10a. The notion that the stronger a *Batson* claimant's *prima facie* case at step one, the more cogent is the reason for ignoring that evidence at step three is completely unsound—as this Court, which took careful note of the fact that petitioner had "already met" step one, manifestly recognized in insisting nonetheless that the powerful historical evidence *had* to be considered in step three.

What is more, although in words the court of appeals seemingly acknowledged that historical evidence might undermine a prosecutor's race-neutral reasons, in practice it declined even to consider that evidence in this case because the state court, which was "in the best position to make a factual credibility determination, heard the historical evidence and determined that the prosecutors' race-neutral reasons for the peremptory strikes to be genuine." *Id.* The Fifth Circuit failed even to acknowledge what this Court took pains to point out: that the trial court conducted the *Batson* hearing more than *two years* after jury selection, significantly reducing any advantage in making credibility determinations, *id.* at 26a, and that these determinations were made by a trial judge who, even after a remand in which the Texas Court of Criminal Appeals had found that

petitioner had met his step-one burden, "somehow" explicitly concluded that he had *not* done so, (*id.* at 37a).

The court of appeals also ignored other evidence of the historical discrimination that this Court specifically directed it to weigh. First, this Court noted that petitioner's evidence indicated that African-Americans "almost categorically were excluded from jury service." App. 43a. This evidence, according to this Court, "reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection," and such bias is "of course relevant to the extent it casts doubt on the legitimacy of the State's motives in petitioner's case." *Id.* But the Fifth Circuit again refused to give this evidence any weight, because the court viewed it as relevant only to step one, and in any event had already concluded that the trial court's credibility determinations should be accepted. *Id.* at 9a-10a.

Finally, the Fifth Circuit failed altogether to mention petitioner's remaining historical evidence. Both prosecutors involved in petitioner's jury selection joined the District Attorney's Office when that office formally trained its prosecutors to exclude minorities from juries. App. 43a. As this Court indicated, that evidence leads to the "supposition that race was a factor" in petitioner's jury selection, and this supposition "could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." *Id.* This supposition is further reinforced, this Court held, by evidence that one of the prosecutors in this case had been found to have discriminated on the basis of race in another capital murder trial conducted while petitioner's state-court appeal was pending. *Id.* at 42a (citing *Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)).

Yet the Fifth Circuit made no mention of any of this evidence. Rather than weighing the credibility of the proffered race-neutral reasons against this backdrop of historical discrimination, as this Court directed, the Fifth Circuit did just the opposite: it accepted without question the state

court's credibility determinations—and then having done so, rejected any relevance of the historical evidence because it had already concluded that the prosecutors had legitimate motives to strike the jurors in question. This reasoning is flatly inconsistent with this Court's guidance, and it results in the improper application of *Batson* step three as well as of §§ 2254(d)(2) and (e)(1).

B. The Court Of Appeals Failed To Follow This Court's Direction To Weigh The Evidence That The Prosecutors Used Jury Shuffles To Manipulate The Racial Composition Of The Jury.

This Court also directed the Fifth Circuit to consider the evidence regarding "jury shuffles." App. 42a. The jury shuffle is a technique the Dallas County District Attorney's Office used—by its own admission—to "manipulate the racial composition of the jury." *Id.* Under Texas criminal procedure practice, parties are permitted to "rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled." *Id.* at 30a. The party requesting the procedure, with no information other than the appearance of the venire members, "literally shuffles the juror cards, and the venire members are then reseated in the new order." *Id.* Shuffling is a tool to manipulate the racial composition of the jury because jurors who are shuffled to the back of the panel are unlikely to serve, given that any prospective juror not questioned during *voir dire* is dismissed at the end of the week. *Id.* at 30a-31a.

This Court agreed with petitioner that the "prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." App. 42a. This suspicion "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." *Id.* And this Court faulted the state court for "apparently ignor[ing]"

evidence that the District Attorney's Office had admittedly used this technique for just such a racially discriminatory purpose. *Id.*

But the Fifth Circuit declined to consider the State's discriminatory use of jury shuffles, offering only the irrelevant observation that the defense had also requested shuffles. App. at 10a. The court failed to weigh the effect that this practice of "jury shuffling" had on the credibility of the prosecutors' assertions of non-discriminatory motive—a concern identified by this Court as important in conducting the *Batson* step-three analysis. *Id.* at 42a. And the court never even acknowledged the state court's apparent refusal to consider evidence regarding the past discriminatory use of this tactic by Dallas County prosecutors to exclude African-Americans from jury service—evidence that "amplified" this Court's concerns. *Id.* at 42a, 44a. Instead, the Fifth Circuit dismissed the evidence of the jury shuffles as "circumstantial evidence" that does not "overcome" the prosecutors' proffered race-neutral reasons for their strikes. *Id.* at 10a.

Of course, as this Court had already explained, the question is not whether each individual piece of evidence can itself "overcome" the proffered race-neutral reasons; the question is whether the cumulative weight of such evidence so erodes the credibility of the prosecution's assertion that race was not a factor that that assertion becomes "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991).

The "jury shuffle" provides a perfect opportunity to discriminate for those "who are of a mind to discriminate," *Batson*, 476 U.S. at 96, and the pattern and practice evidence adduced by petitioner demonstrates that the District Attorney's Office was "suffused" with such bias. Indeed, the shuffles show that the prosecution was attempting to exclude African-Americans from the jury before it knew anything about their views—when it had "no information about the prospective jurors other than their appearance." App. 30a. The shuffles thus undermine "the credibility of the prosecu-

tion's assertion that race was not a motivating factor in the jury selection" (*id.* at 42a), and instead support the conclusion that the race-neutral reasons which the prosecution later cited—and which the panel unreservedly endorsed—were pretexts for discrimination.

C. The Court Of Appeals Failed To Follow This Court's Guidance To Consider The Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans From The Jury.

The record evidence at the post-trial *Batson* hearing showed that the prosecutors in petitioner's trial had questioned venire members differently based on race, with the intent to disqualify or otherwise remove African-Americans from the jury. *See* App. at 28a-30a, 40a. The state trial court, however, found that there was no disparate questioning, and the Fifth Circuit in denying petitioner's COA agreed, concluding that "[t]he findings of the state court that there was no disparate questioning of the *Batson* jurors . . . is fully supported by the record." *Id.* at 40a (quoting *Miller-El*, 261 F.3d at 452).

This Court rejected that conclusion. App. 40a. The Court found that the Fifth Circuit's interpretation of the evidence in this regard was "dismissive and strained," and that "disparate questioning *did* occur." *Id.* (emphasis added). This Court concluded that the disparate questioning concerned two topics: the venire members' views on the death penalty and on minimum sentencing. Yet on remand, the Fifth Circuit continued to treat dismissively the very evidence of racially disparate questioning addressed by this Court.

1. Views on the death penalty

The prosecutors asked all of the potential jurors about their views on the death penalty, but this inquiry was prefaced, in some cases, with a graphic description of an execution that was intended to elicit hesitancy about the death penalty. App. at 41a. This graphic description was used for 53% of African-Americans, but with only 6% of white venire

members. *Id.* The State argued before this Court that that statistical disparity was not based on race but was the result of a disproportionate number of African-American venire members having indicated doubts about the death penalty on their juror questionnaires. *Id.*

This Court rejected that explanation, finding that it "cannot be accepted without further inquiry" because "the State's own evidence is inconsistent with that explanation." App. 41a. As this Court explained, even by the State's own reckoning, 70% of the African-Americans who expressed hesitancy about the death penalty received the graphic script while only 20% of the potential white jurors who had expressed hesitancy received that script. *Id.*

Yet on remand the State offered the very same explanation—in fact submitting an almost identical brief. And the Fifth Circuit in turn, far from undertaking the "further inquiry" mandated by this Court, proceeded to reach the same conclusion that this Court had already rejected, stating that "the record . . . reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race." App. 18a. Further demonstrating its disregard for this Court's decision, the Fifth Circuit's analysis on this point consisted entirely of passages taken almost *verbatim* and without attribution from the *dissent* to this Court's opinion. *Compare id.* at 61a-63a (Thomas, J., dissenting) *with id.* at 19a-21a.

Unsurprisingly, therefore, the Fifth Circuit repeated its previous error of "accept[ing] without question the state court's evaluation of the demeanor and credibility of the prosecutors and jurors in petitioner's trial." App. 38a. Rather than examining whether there was evidence in the record to support the state court's conclusion that there was no disparate questioning, the Fifth Circuit simply accepted that conclusion, "presuming" that there must be additional evidence—not in the record—that supported the state court's conclusion. *Id.* at 19a-20a.

Specifically, of the 10 white venire members identified by the State as having expressed hesitancy about the death

penalty on their juror questionnaires, *only two* were given the graphic script, while of the 10 African-American venire members identified by the State as having similarly expressed hesitancy, *seven* received the graphic script. App. at 41a. Petitioner contended that there was therefore no force to the State's argument that the disparate questioning was based on the potential jurors' views about the death penalty, and there was no explanation for the statistical disparity other than race. Reply Brief for Petitioner 15, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002). The Fifth Circuit, however, concluded that because the State claimed that the disparate questioning was driven by the jurors' answers about the death penalty on their juror questionnaires, the eight white jurors who were not given the graphic script "presumably" had answered their questionnaires in a way that indicated they were firmly opposed to the death penalty, such that there was no reason to give them the graphic script to "find out" their views. App. 19a-20a.

The Fifth Circuit adopted this theory from the dissent to this Court's opinion in *Miller-El*, which likewise hypothesized that the prosecution used the graphic script only with jurors whose juror questionnaires indicated ambivalence about the death penalty. App. at 61a-62a (Thomas, J., dissenting). It imagined that jurors who expressed clear opposition to the death penalty escaped the graphic script because their views needed no clarification. *Id.* at 60a. This theory rests entirely on speculation, however, because the questionnaires of most of the white jurors—including many of those whose *voir dire* testimony the dissent cites—*were not part of the record*. *Id.* at 61a.[2] And most important, this theory was obviously rejected by the Justices who formed the majority of this Court in *Miller-El*.

Of course, §§ 2254(d)(2) and (e)(1) require an evaluation of the factual determinations actually made by the state

[2] Miller-El sought discovery of the remainder of the white jurors' questionnaires in federal district court, but was not granted access to this information.

court, and of its decisions based on factual determinations made "in light of the evidence presented in the state-court proceeding." Evidence outside that record—particularly evidence that is only "presumed" to exist—is not relevant. In any event, as this Court pointed out, if such evidence had existed, "it cannot be presumed that the State would have refrained from introducing it." App. 41a-42a (internal citations and quotation marks omitted).

2. Minimum sentencing

The prosecutors also questioned potential jurors differently about their willingness to impose the minimum sentence for murder. App. at 28a-29a. Under Texas law at the time of petitioner's trial, an unwillingness to impose the minimum sentence was cause for removal, *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub. nom. Huffman* v. *Beto*, 408 U.S. 936 (1972), and questioning in this regard is a strategy normally used by the defense to "weed out pro-state members of the venire" (App. 29a).

"[I]ronically," however, the prosecutors in petitioner's trial themselves employed this strategy (App. 29a), and in a starkly disparate way: 94% of the whites were informed of the statutory minimum before being asked whether they could impose that minimum, while only 12.4% of African-Americans were so informed of the statutory minimum (*id.* at 41a). The State proffered "[n]o explanation . . . for the statistical disparity." *Id.* Accordingly, this Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." *Id.* at 42a.

Yet with precisely the same record the Fifth Circuit on remand concluded the opposite: that "[t]he prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser-included defense of murder." App. 21a. The court of appeals explained that the prosecution used the different

questioning on the minimum sentence issue only "as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause." *Id.*; *see also id.* at 64a (Thomas, J., dissenting) (same).

Aside from the dubious logic of that assertion, it also contradicts a specific finding of this Court. That is, the Fifth Circuit asserted that the African-American venire members who were given the "allegedly manipulative minimum punishment script" were given that script because they were all opposed to the death penalty in varying degrees. *Id.* at 21a; *id.* at 64a (Thomas, J., dissenting) (same). But this Court had previously found that there were white venire members who "also expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but were not subjected to this manipulative questioning. *Id.* at 40a; *see also* Respondent's Brief 19 & n.44, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002). And in any event, putting aside whether the State's characterization of "ambivalence" is accurate with respect to the African-Americans who were given the graphic script, its position still leaves unexplained the State's failure to use its manipulative script with the vast majority of white venire members who expressed reservations about the death penalty. App. 41a; Reply Brief for Petitioner 17 n.23, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002).

Moreover, the Fifth Circuit never even acknowledged, much less accounted for, a fact this Court found highly significant: that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." App. 42a. By failing to consider all the evidence and the light it sheds on the motives and credibility of the prosecutors, the Fifth Circuit impermissibly deviated from this Court's guidance and from the requirements of § 2254.

D. The Court Of Appeals Improperly Accepted Without Question The State Court's Credibility Determinations And Failed To Follow This Court's Guidance Regarding Similarly Situated Venire Members.

This Court explained that the "critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." App. 35a. That question "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Id.* Whether those explanations were credible, and in turn whether the state court's determination in this regard was reasonable under § 2254, must of course be viewed in light of all the evidence. App. 37a; *Batson*, 476 U.S. at 93 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Hernandez*, 500 U.S. at 365; *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000).

Accordingly, this Court first noted that the prosecution in petitioner's trial had used its peremptory strikes to remove 91% of the eligible African-American venire members, while it had used such strikes against only 13% of the eligible non-black prospective jurors. App. 28a, 39a. This "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," according to the Court, because [h]appenstance is unlikely to produce this disparity." *Id.* at 39a.

The Court also pointed out that the trial court's traditional advantage in judging credibility, based on its contemporaneous observation of the jury selection process, was significantly reduced here because the *Batson* hearing was not held until more than two years after the jury was empaneled. App. 39a. As a result, this Court noted, "the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." *Id.* And the Court observed that ra-

cially disparate questioning of potential jurors will affect the evaluation of whether those jurors in fact have "divergent" views that could justify a peremptory strike and must be considered when evaluating pretext. Specifically, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." *Id.* at 40a-41a.

Once again, however, the Fifth Circuit on remand ignored this guidance. Its analysis of whether the prosecutors' race-neutral reasons were pretexts for discrimination, including whether there were similarly situated white jurors, makes no mention of (1) the two-year delay before the *Batson* hearing was held, (2) the gross racial statistical disparity in peremptory strikes, (3) the effect of disparate questioning on the characterization of the venire members views, or (4) any of the other evidence that this Court identified as relevant to the analysis. Instead, the court simply imported, frequently *verbatim*, many of the State's previously-rejected arguments attempting to distinguish the views of the challenged jurors. *Compare* App. 11a-18a *with* Brief of Appellee (on remand) 6-13, 16-18, *and* Brief of Respondent (before this Court) 3-8, 11-12.

But the Fifth Circuit's error here is more fundamental. That court made no attempt to evaluate whether the prosecutors' assertedly race-neutral reasons for striking African-American venire members might in reality have been based on racial considerations. Instead, the court stated that "once we have identified the reasons for the strikes, the credibility of the reasons is *self-evident*." App. 11a (emphasis added). But this Court remanded this case for the Fifth Circuit to evaluate the evidence supporting petitioner's claim, including the evidence that similarly situated white jurors were not struck, specifically because the credibility of the prosecutors' reasons was *not* "self-evident." *Id.* at 40a (whether prosecutors' reasons were pretexts for discrimination is debatable).

In reaching that conclusion, this Court found that "[i]n this case, three of the State's proffered race-neutral ration-

ales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." App. at 39a-40a (ambivalence about the death penalty, hesitancy to impose the death penalty on those who could be rehabilitated, and the jurors' own family history of criminality). The Fifth Circuit flatly ignored that finding and held, on precisely the same record, that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans." *Id.* at 11a.

The Fifth Circuit's ultimate conclusion that there was no purposeful discrimination in petitioner's jury selection, therefore, rested on two erroneous findings: that the credibility of the prosecutors' reasons for striking African-American venire members was "self-evident," and that there were no unchallenged non-black venire members situated similarly to the struck African-Americans. Both of these findings directly contravene this Court's opinion.

In any event, the evidence in the record also contradicts the court of appeals' characterization of the *voir dire*. Although space limitations preclude a full refutation of the State's and Fifth Circuit's characterization of the *voir dire*, some examples are illustrative. The Fifth Circuit's treatment of African-American venireperson Billy Fields is typical. The court of appeals credited the State's assertion that "[t]he prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony." App. at 12a. The record shows, however, that, if anything, Fields was more supportive of the death penalty than white jurors whom the State found qualified, and that his religious beliefs buttressed that support.

Fields expressed unambiguous support for the death penalty on his questionnaire, and then wrote "[i]f you commit the crime pay the pen[alt]y." *See* Reply Brief for Petitioner 2, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002) (alteration in original). Although Fields believed that every-

one can be rehabilitated, he made it clear that he would vote for the death penalty *even* for someone who could be rehabilitated. JA 118-119. Fields' religious faith in fact led him to *strongly support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 108. Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108. It is difficult to imagine a more pro-State juror than one who views the State as "God's extended person."

In contrast, seated white juror Sandra Hearn expressly stated that her support for the death penalty *depended* on whether the defendant could be rehabilitated. JA 694 ("I believe in the death penalty *if* a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense." (emphasis added)).[3] If anything, it was the seated white juror's views on rehabilitation that were likely to have an impact on her willingness to impose the death penalty.

With the white juror, however, the Fifth Circuit looked beyond her comments about rehabilitation and explored her *voir dire* for other attributes that made her a strong State's juror. Hearn was a strong State's juror and petitioner's trial counsel tried to remove her, a fact that caused the panel to label petitioner's arguments as somehow "disingenuous." App. 15a. But Fields' *voir dire* indicated that he was also a strong State's juror; he was a conservative, deeply religious, middle-aged family man with deep roots in the community

[3] White juror Kevin Duke also expressed strong views about the virtues of rehabilitation. When questioned about a law that would permit a convicted murderer to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it . . . . I believe in forgiving." JA 587.

and strong, pro-death penalty views. JA 125-127. The Fifth Circuit's conclusion that he was struck because of his views on rehabilitation finds no support in the record.

According to the court of appeals, Fields was also properly struck because he had a family member with a criminal history. App. 12a. But when the prosecution asked Fields about the incarceration of his brother, Fields responded, "I don't really know too much about it." JA 124, 133-134. When asked whether his brother's trouble with the law "would in any way interfere with [his] service on this jury," Fields unhesitatingly said, "No." JA 124. The State's treatment of Fields contrasts sharply with that of Noad Vickery, a white venireperson who was accepted by the State and struck by the defense. Like Fields, Vickery was unsure of the details of his sibling's incarceration. But unlike Fields, Vickery hesitated when asked whether it would interfere with his service on the jury:

> Q: Would that affect your ability to serve as a juror in this case?
>
> A: I don't think so, no.
>
> Q: You keep on saying "I don't think so." When you say I don't think so, you're saying that's no?
>
> A: No, it would not, I'm sorry.

JA 435-436. If anything, Vickery's hesitations made him a less attractive juror, and if concern about a family member's criminal history motivated the prosecutors' strike of Fields, it should have similarly subjected Vickery to a prosecution strike.[4]

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[4] The Fifth Circuit attempted to justify the prosecution's disparate treatment of potential jurors who had a family member with a criminal history with distinctions based on the particular circumstances of the relative's criminal episode. App. 17a. But such distinctions were not made by the prosecutors at the time, and cannot now be used to rationalize the prosecutors' motives. The prosecutors for the most part failed even to ask questions on the subject when potential jurors revealed a family member with a criminal history. For example, three African-American venire

The Fifth Circuit faulted petitioner for "fail[ing] to identify any unchallenged non-black venire member similarly situated" to the *Batson* jurors because there were allegedly no white seated jurors who shared the same combination of characteristics as the African-American jurors who were excluded by the State. App. 18a. But this Court specifically found, on the same record, that "three of the State's proffered reasons for striking African-American jurors pertained just as well to some white jurors who were not challenged" and who served on the jury (App. 40a).

What is more, petitioner did identify such similarly situated jurors. For example, white venireperson Vickery expressed the precise combination of reasons the State used to justify striking Fields. In addition to having a relative with a criminal history, Vickery also expressed ambivalence about the death penalty and hesitancy about imposing it.[5] And even the concurring and dissenting Justices on this Court conceded that "petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza." App. 49a (Scalia, J., concurring); *see also* App. 58a-59a (Thomas, J., dissenting). Ambivalence about

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members were struck by the prosecution for the proffered reason that each had relative with a criminal history. However, four white jurors had a relative with a criminal history and were accepted by the State. Of these seven jurors, the State questioned only two (one white and one African-American, Fields) about this issue.

[5] Inquiring into Vickery's feelings about the death penalty, the prosecution asked him whether, if he were governor for a day, he would keep or abolish the death penalty. Vickery responded: "I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again, as a human being, it's hard to say that you want to see someone die. I honestly can't tell you, you know, how I feel." App. 67a. Mr. Vickery was also asked whether he himself could apply the death penalty in a specific case, and again gave a far from resounding answer: "I think I can make a decision [if placed on a sentencing jury]. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I don't particularly want to make it, but I think I could." App. 67a-68a.

the death penalty was the sole reason proffered for striking Edwin Rand. In short, the prosecution accepted white jurors who were similarly situated to African-Americans that were peremptorily removed, and there is no credible explanation for their having done so other than race.

II. THIS CASE IS OF PARAMOUNT IMPORTANCE

In addition to directly contradicting several of this Court's specific conclusions, the Fifth Circuit's entire approach to the *Batson* step-three analysis, and by extension to the analysis under § 2254, is fundamentally flawed. Its denial of relief on the merits simply repeats the errors it committed in denying the COA, by failing to fully consider all the relevant evidence and by accepting "without question" the state court's credibility determinations.

The opinion below thereby not only undermines this Court's supervisory authority, but it also interprets this Court's precedents for applying *Batson* and § 2254 in a manner that deprives both of meaning. The evidence that white jurors who were not peremptorily struck were similarly situated to African-American venire members who were—along with the evidence of the history of discrimination in jury selection in Dallas County, the use of jury shuffles and disparate questioning to manipulate the racial composition of the jury, and the fact that one of the prosecutors in this case had previously committed a *Batson* violation—all shed light on the credibility of the prosecutors' proffered rationales and whether those rationales were pretexts for discrimination. Yet despite this Court's explicit guidance, the Fifth Circuit failed to consider this and other evidence, in substance if not in form. *See, e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 440-441 (1995) (despite Fifth Circuit's assurance that it had considered "all" evidence relevant to *Brady* materiality analysis, this Court finds that the Fifth Circuit actually "dismiss[ed] *particular* items of [*Brady*] evidence as immaterial," an approach which added up to a "series of *independent* materiality evaluations, rather than the cumulative evaluation" required by precedent) (emphasis added); *Banks* v. *Dretke*, 124 S. Ct. 1256, 1270, 1276 (2004) ("[T]he Fifth Circuit . . . con-

cluded . . . [that] Farr's status as an informant was not 'materia[l]' for *Brady* purposes. . . . Our touchstone on materiality is *Kyles v. Whitley*, . . . [which] instructed that the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict'" (emphasis added)); *Williams* v. *Taylor*, 529 U.S. 362, 397-398 (2000) (faulting state court for failing to consider "totality" of the evidence in evaluating prejudice caused by counsel ineffective assistance).

It is of paramount importance for this Court to take this case, therefore, both to affirm its supervisory authority over the lower courts and to vindicate the very purpose for its original grant of certiorari—to provide guidance to the lower courts as to the proper way to evaluate evidence under *Batson* such that its protections do not become a "vain and illusory" promise. Equally important, and closely related, is the need for this Court to provide guidance to the lower courts as to the proper evaluation of evidence under the standards of §§ 2254(d)(2) and (e)(1). This question pervades federal habeas practice. If the Fifth Circuit's decision—in which it accepted "without question" the state court's evaluation of the prosecutors' credibility—is allowed to stand, then the standards under § 2254 for reviewing state-court decisions based on factual determinations will be nullified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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