No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

RONNIE KIRKSEY, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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January 21, 2016

CAPITAL CASE

QUESTIONS PRESENTED

1. In this capital case, was the Alabama courts' refusal to enforce Batson v. Kentucky, 476 U.S. 79 (1986), directly contrary to this Courts precedent?

2. Does this Court's decision in Hurst v. Florida, No. 14-7505, render a death sentence unconstitutional when that sentence is the result of a process that reduces the jury's sentencing role to a mere recommendation and grants the trial judge ultimate authority to independently make the findings necessary to impose a death sentence?

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PETITION FOR WRIT OF CERTIORARI

Ronnie Kirksey respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Kirksey's conviction and death sentence, Kirksey v. State, No. CR-09-1091, 2014 WL 7236987 (Ala. Crim. App. Dec. 19, 2014), is not yet reported and is attached at Appendix A, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Kirksey's petition for a writ of certiorari, Ex parte Kirksey, No. 1140749 (Ala. Sept. 18, 2015), is unreported and attached at Appendix B.

JURISDICTION

On December 19, 2014, the Alabama Court of Criminal Appeals issued an opinion affirming Mr. Kirksey's capital murder conviction and death sentence. Kirksey v. State, No. CR-09-1091, 2014 WL 7236987 (Ala. Crim. App. Dec. 19, 2014). On April 10, 2015, the court denied Mr. Kirksey's rehearing application. On September 18, 2015, the Alabama Supreme Court denied Mr. Kirksey's petition for a writ of certiorari . Ex parte Kirksey, No. 1140749 (Ala. Sept. 18, 2016). On December 4, 2015, Justice Thomas extended the time to file this petition until January 21, 2016. Mr. Kirksey invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall . . . 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.

Alabama's capital sentencing statute, Ala. Code § 13A-5-47(e), reads:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

I. Proceedings Below

This is a case in which the death penalty has been imposed. Petitioner, Ronnie Kirksey, was arrested and indicted on one count of capital murder in connection with the death of Cornell Norwood, Mr. Kirksey's girlfriend's 23-month-old son. (C. 17.)[1]

[1] "C." refers to the clerk's record. "R." refers to the trial transcript. "Supp. C." refers to the supplemental clerk's record.

During jury selection, the prosecution used its peremptory strikes to exclude eight of the nine black venirepersons eligible for jury service and defense counsel raised an constitutional objection citing Batson v. Kentucky, 476 U.S. 79 (1986). (Supp. C. 40-43; R. 1214.) The trial court found a prima facie case of discrimination but required the State to provide reasons for just three of the eight strikes. (R. 1235-36.) The State did so, and also volunteered a general statement that it had not struck anyone due to race. (R. 1237-38.)[2] The trial court accepted the jury as struck and Mr. Kirksey was tried in Etowah County, Alabama, by eleven white jurors and one black juror. (R. 1248.) On February 18, 2010, the jury convicted Mr. Kirksey of capital murder. (C. 163; R. 2176.) On February 22, 2010, the jury returned a non-binding advisory recommendation for a sentence of death. (C. 165; R. 2321.) Two months later, on April 30, 2010, the trial judge conducted the ultimate sentencing hearing where, under Alabama law, the judge was required to make independent findings as to the aggravating and mitigating

[2]After the trial court ruled that it would not require the State to give reasons for five of the eight strikes, the State made broad statements about its lack of discriminatory intent and generally asserted:

> [W]e struck every single individual, whatever their race, whatever the gender, who indicated on voir dire that they were opposed to the imposition of the death penalty. And that's going to account for the majority of the black jurors that were struck, I believe. . . . Now, the individuals you've pointed out, I'm going to ask Carol to respond to those, because she has much better notes than I do on that. But I do want to assert, because this is a record that's going down there, we struck no juror, not a single one, because of their race. We struck not one single juror because of their gender.

circumstances and to independently weigh those aggravating and mitigating circumstances to determine the sentence. See Ala. Code § 13A-5-47(d)&(e). It was only after the judge independently concluded that the aggravating circumstances outweighed the mitigating circumstances, that Mr. Kirksey was sentenced to death. (C. 189-95; R. 2345.)

In a timely appeal to the Alabama Court of Criminal Appeals, counsel for Mr. Kirksey argued that the State had engaged in racial discrimination in jury selection, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The court affirmed Mr. Kirksey's conviction and death sentence on December 19, 2014, holding that the trial court did not err in requiring the State to explain only three of the eight strikes, and also concluding that the State's volunteered, vague, non-particular assertions of non-discriminatory intent were sufficient to constitute proffered reasons for the other five strikes. Kirksey, 2014 WL 7236987, at *23. The Alabama Court of Criminal Appeals also affirmed the State's proffered reasons and held that the constitution only requires partial review when multiple reasons are proffered for the same strike. Id. at *25 ("[H]aving found that concerns over Es.D.'s poor health was a race neutral reason justifying the State's exercise of a peremptory strike against Es.D., no determination concerning any other reason given by the prosecutor needs to be made.").

Mr. Kirksey next sought review at the Alabama Supreme Court on several questions, including whether the Alabama Court of Criminal Appeals's decision upholding the trial court's analysis and ruling that the State did not discriminate

against African-American members of the venire during jury selection violated Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); and Snyder v. Louisiana, 552 U.S. 472 (2008). The court denied writ on September 18, 2015. Ex parte Kirksey, No. 1140749 (Ala. Sept. 18, 2015). Mr. Kirksey now respectfully petitions for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

II. Relevant Facts

On April 15, 2006, Yolanda Norwood left her 23-month-old son, Cornell Norwood, with her live-in boyfriend, Ronnie Kirksey, while she ran several brief errands and visited a neighbor's apartment. (R. 1297-98, 1300, 1303-04.) Mr. Kirksey frequently babysat Cornell and Ms. Norwood's two other children. (R. 1290.) When Ms. Norwood arrived home that afternoon, Mr. Kirksey "came running down the stairs" and told her something was wrong with Cornell. (R. 1304.) Mr. Kirksey began administering CPR while Ms. Norwood called 911 and reported that Cornell was having respiratory problems. (R. 1305-06, 1373.) Paramedics responded and transported Cornell to a local hospital where he later died.

By all accounts, Mr. Kirksey cared for Cornell as a father figure and had a close relationship with the young boy; Ms. Norwood testified that Cornell had a "special attachment with Ronnie." (R. 1294, 1951, 1954.) Mr. Kirksey insisted Cornell's injuries were accidental and was initially arrested on an outstanding warrant related to a traffic ticket. For four days, he was held incommunicado and interrogated repeatedly about Cornell's death. (R. 293; C. 229.) Mr. Kirksey gave varying and

conflicting statements under these conditions, but consistently maintained that he had not intended to seriously injure Cornell. (C. 231, 233; R. 1483, 1514-15, 1982.) Mr. Kirksey was ultimately arrested, charged, and indicted on one count of capital murder for murder of a victim under age fourteen. (C. 17).

The trial took place in Etowah County, Alabama, in February 2010. Two other highly-publicized capital murder cases involving child victims and weak intent evidence had been tried in the county within the previous four months; when Mr. Kirksey's trial began, one of these cases was pending sentencing and one had already resulted in a death sentence. (C. 85; R. 82-83.) A motion for change of venue was denied. (C. 85-94, 102; R. 82-83, 1195.)

Jury selection began with fourteen African-American prospective jurors on the venire. The State successfully sought challenges for cause against five of the fourteen, and then used peremptory strikes to exclude eight – or 89 percent – of the remaining nine. (Supp. C. 40-43.) Citing Batson v. Kentucky, 476 U.S. 79 (1986), the defense objected and argued that these dramatic statistics, coupled with the prosecutor's disparate questioning of jurors based on race, established a prima facie case of racial discrimination against African American members of the venire. (R. 1214.)

The trial court found a prima facie case of discrimination, but required the prosecutor to give reasons for only three of the eight strikes used against African Americans. (R. 1235-36.) The prosecution claimed it struck prospective juror Es.D., who expressed a desire to serve on the jury and supported the death penalty (R. 1144, 1226), because she had "health issues." (R. 1241) The State did not strike white

veniremember T.P., who had health problems that prevented him from sitting for long periods of time and was on medication that made him "sleepy." (R. 961.) The State also compared Es.D. to another black juror who was struck for cause because he exhibited comprehension problems, even though race was the only shared characteristic between the two individuals. (R. 1247-48.) Lastly, the State claimed it struck Es.D. because she did not answer every question in her questionnaire. (R.1240). Several white jurors allowed to serve also did not answer every question on their questionnaires.

The trial court also required the State to provide reasons for striking D.P. and B.R. Prosecutors claimed both individuals expressed equivocal views on the death penalty and also cited B.R.'s demeanor. (R. 1238-39.) The record shows both D.P. and B.R. indicated that they could impose death. (R. 982, 1115.) In addition, both veniremembers held characteristics and views favorable to the prosecution: D.P. revealed she had been the victim of robbery and believed the State's burden of proof to be to high (R. 982); and B.R. indicated that she "felt like the defendant would need to testify." (R. 1115.) The trial court made no findings regarding B.R.'s demeanor.

The trial court accepted the prosecutor's proffered reasons for striking three of the total eight African-American veniremembers it struck, and denied the defense's Batson motion. (R. 1248.) As a result, Mr. Kirksey, who is African American, was tried by a jury with eleven white members and one African-American member. (Supp. C. 40-43.) This jury convicted Mr. Kirksey of capital murder on February 18, 2010 (R. 2176-77) and four days later rendered a non-binding advisory recommendation that

Mr. Kirksey be sentenced to death. (R. 2321; C. 165.) On April 30, 2010, the trial court independently found one aggravating factor and sentenced Mr. Kirksey to death. (R. 2345; C. 189-95.)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE THAT ALABAMA COURTS PROPERLY APPLY BATSON V. KENTUCKY.

The United States Constitution prohibits racial discrimination in the selection of a trial jury. Batson, 476 U.S. 79 at 89. This Court's decision in Batson established a three-step process by which reviewing courts are required to evaluate allegations of racial discrimination in jury selection. First, using testimony in the record or other relevant facts, the moving party must establish a prima facie case of discrimination by demonstrating that opposing counsel has exercised peremptory strikes to exclude members of a certain protected group. Batson, 476 U.S. at 96. Once a prima facie case has been established, the burden shifts to the State to provide race-neutral reasons for these peremptory strikes. Id. at 97. The trial court must then evaluate the State's proffered reasons to determine whether they are sufficient to overcome the inference of discrimination, or merely pretextual. Id.

Alabama courts have consistently and continuously misapplied this Court's Batson jurisprudence at all three stages of this analysis. Mr. Kirksey's case is a critical example. First, after the State excluded eight of nine eligible black jurors, the trial court refused to consider this statistical evidence of discrimination and therefore required explanations for only three of the eight challenged strikes. Second, on review,

the lower court employed a strained and unlawful reading of the record to find that the State *had* explained all eight strikes, then held that a strike will be affirmed as long as a single proffered justification is facially race neutral, regardless of any other evidence of discrimination. This decision, which was consistent with repeated holdings of the Alabama courts in Batson cases, was directly contrary to this Court's decisions in Batson v. Kentucky, 476 U.S. 79, 96 (1986) and its progeny. Intervention by this Court is necessary to prevent the Alabama courts from continuing to erroneously apply an improper analysis in Batson cases.

A. After Finding a Prima Facie Case of Discrimination, The Trial Court Violated Batson and its Progeny by Failing to Require the State to Provide Reasons for all Eight Strikes of African-American Veniremembers.

Using the strike-down system employed in Alabama trial courts, defense counsel for Mr. Kirksey and counsel for the State exercised their peremptory strikes, alternating between the two sides until the venire had been reduced to the number needed for the jury. (R. 1212.) After the trial court *sua sponte* ordered a brief break for the State and defense to review each others' strikes and make any necessary motions (R. 1212-13), defense counsel made a Batson motion on the grounds that the State had struck 89 percent of eligible African-American venirepersons and engaged in disparate questioning by race. (R. 1214.)

Defense counsel argued that the State had subjected black veniremembers to "super-qualification," targeting them for extensive follow-up voir dire regarding the death penalty after initial rehabilitation on the issue in order to elicit bases for

strikes, while white veniremembers who expressed similar views were not questioned further after rehabilitation. (R. 1218-21.) The record shows that all black veniremembers who expressed reservations about the death penalty were targeted for further questioning, while the State made no effort to aggressively question or pursue for-cause challenges against white veniremembers M.M., B.P., H.S., D.W., E.D., D.F., or C.H. – all of whom indicated they were personally opposed to the death penalty before being rehabilitated during group voir dire. See (R. 507, 606-07, 730-33, 851-52, 1034-35.)

Defense counsel also offered the example of African-American veniremember J.H., whom the State attempted to recall for further voir dire because he was opposed to capital punishment. (R. 774-75.) When defense counsel successfully argued that J.H. should not be questioned further because he indicated that he could fairly consider death despite his personal feelings, the State searched for other potential bases to exclude J.H. and claimed it wanted to inquire further about his wife's medical condition. (R. 776-77.) After the State was unsuccessful in its search for a basis to challenge J.H. for cause, it used its third peremptory strike to remove him. (R. 777-79; Supp. C. 43.) In contrast, white veniremember C. J. also indicated that he had medical issues, but the State did not seek follow up with him. (R. 409-10, 780.)

The trial court acknowledged that the State had engaged in disparate questioning during jury selection (R. 1235), but then misapplied step one of the Batson inquiry and evaluated the evidence of discrimination separately for *each strike* rather than to the entire class of African American venirepersons. The court reasoned that

numbers alone were not enough to satisfy step one of the Batson procedure,[3] and drew an erroneous distinction between excluded black members of the venire who experienced clear disparate treatment and those who merely contributed to the aggregate statistical evidence.[4] Defense counsel offered Es.D., D.P., and B.R. as venirepersons for whom there was demonstrable record evidence of discriminatory treatment – but also disputed the court's interpretation of Batson: "It's my understanding of the law that once a prima facie case has been established to even one juror, that the State has to give a reason on all of the black jurors that were struck." (R. 1228.)

Nevertheless, relying on its misreading of Batson and several Alabama cases, the trial court reasoned that defense counsel was required to make out a prima facie

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[3]Despite this Court's precedent to the contrary, Miller-El v. Cockrell, 537 U.S. 322, 342 (2003), Alabama courts have reiterated this standard in case after case. See Williford v. Emerton, 935 So. 2d 1150, 1157 (Ala. 2004) (holding that, where defendant relied upon "numbers alone" to establish prima facie case of discrimination, "the trial court properly determined that [defendant] had not established a prima facie case"); Wimberly v. State, 931 So. 2d 60, 64 (Ala. Crim. App. 2005) ("Clearly, Wimberly failed to establish a prima facie case of racial discrimination because he relied solely on the number of blacks that had been struck by the State."); Gissdendanner v. State, 949 So. 2d 956, 962 (Ala. Crim. App. 2006) ("Gissendanner based his Batson motion entirely on the numbers of black veniremembers struck and the number of blacks who remained on the jury. The trial court's denial of the Batson motion without requiring the prosecutor to give reasons for his strikes was consistent with established Alabama law. No error occurred."); Shanklin v. State, No. CR-11-1441, 2014 WL 7236978 at *21 (Ala. Crim. App. Dec. 19, 2014) (holding that "numbers alone" are legally insufficient to establish a prima facie case of discrimination under Batson).

[4]The trial court described this second category of struck African American venirepersons as "just a statistical issue that since the majority – since – is it eight out of nine were stricken; that you believe that is indicative of racial intent." (R.1227).

case of discrimination using evidence beyond "just a statistical issue." (R. 1227, 1236.) The trial court then ruled that defense had only made out a prima facie case of discrimination for jurors Es. D., B.R., and D.P., and required the State to provide reasons for only three of the total eight strikes. After this ruling, the State proffered reasons for those three strikes, and also commented:

> [A]s far as our strikes, we struck every single individual, whatever their race, whatever the gender, who indicated on voir dire that they were opposed to the imposition of the death penalty. And that's going to account for the majority of the black jurors that were struck, I believe. . . . Now, th e individuals you've pointed out , I'm going to ask Carol to respond to those, because she has much better notes than I do on that. But I do want to assert, because this is a record that's going down there, we struck no juror, not a single one, because of their race. We struck not one single juror because of their gender.

(R. 1237-38.) After hearing the State's specific reasons for striking Es.D., D.P., and B.R., the trial court ruled that the State's reasons were race-neutral, and that defense counsel had failed to establish a prima facie case with respect to the other five strikes. (R. 1248-49.)[5]

On review, the Alabama Court of Criminal Appeals endorsed the trial court's misinterpretation of Batson and declined to recognize that requiring explanations for just three of the eight strikes was error. Kirksey, 2014 WL 7236987, at *23. The court

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[5]R. 1248-49:
"So I believe that the State has expressed – articulated meaningful race neutral reasons for the strikes when asked to give explanation by the Court and, therefore, the Batson challenge of the defense is denied. That would go in regards to the three reasons that were articuated and the Court's position that the explanation on the balance of the individuals referenced by the counsel was not – did not rise to the level of establishment of a prima facie case."

also held that the State's generalized assertions of non-discrimination constituted proffered reasons for the other five strikes. Id.

The Alabama Court of Criminal Appeals's decision was in clear violation of this Court's decisions in Batson and its progeny. The evidence argued at Mr. Kirksey's trial was more than sufficient to establish a prima facie case of discrimination and the State was constitutionally-required to provide specific and particularized reasons for all eight of its strikes against black potential jurors.

"A prima facie case of discrimination can be made out by offering a wide variety of evidence." Johnson v. California, 545 U.S. 162, 169 (2005). This Court has provided guidance to trial courts in evaluating the evidence presented:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant *circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination*. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.

Batson, 476 U.S. at 96-97 (emphasis added); see also Johnson, 545 U.S. at 168 (2005).

First, the trial court's reasoning that it could not find a prima facie case of discrimination based on the number of strikes alone is directly contrary to Batson. Indeed, in Miller-El v. Cockrell, 537 U.S. 322 (2003) [hereinafter Miller-El I], this Court found that where "[t]he prosecutors used their peremptory strikes to exclude 91 percent of the eligible African-American venire members, and only one served on the petitioner's jury . . . *the statistical evidence alone* raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." Id. at

342. "Happenstance is unlikely to produce this disparity." Id.

Second, this Court has generally required that a Batson claim be evaluated as to the entire excluded class. In Miller-El I, this Court found the fact that disparate questioning was used to target some African-American veniremembers supported a prima facie case of discrimination as to the entire class and the State was required to explain all strikes exercised against members of that class. 537 U.S. at 344-345;[6] see also Miller-El v. Dretke, 545 U.S. 231, 242 (2005) [hereinafter Miller-El II]. This makes sense because, as this Court has recognized, "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

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[6] SeeMiller-El I, 537 U.S. at 344-45:

> As a preface to questions about views the prospective jurors held on the death penalty, the prosecution in some instances gave an explicit account of the execution process. Of those prospective jurors who were asked their views on capital punishment, the preface was used for 53% of the African-Americans questioned on the issue but for just 6% of white persons. The State explains the disparity by asserting that a disproportionate number of African-American venire members expressed doubts as to the death penalty on their juror questionnaires. This cannot be accepted without further inquiry, however, for the State's own evidence is inconsistent with that explanation. By the State's calculations, 10 African-American and 10 white prospective jurors expressed some hesitation about the death penalty on their questionnaires; however, of that group, 7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description. There is an even greater disparity along racial lines when we consider disparate questioning concerning minimum punishments. Ninety-four percent of whites were informed of the statutory minimum sentence, compared to only twelve and a half percent of African-Americans.

The facts defense counsel for Mr. Kirksey argued at trial largely mirrored those considered in Miller-El I: the State used peremptory strikes to exclude 89 percent of the eligible African-American venire members after disparately questioning that class of potential jurors regarding their views on the death penalty, resulting in a jury of eleven white members and one black member. (R. 1222-23. 1225.) This is precisely the type of evidence this Court has held to be "too powerful to conclude anything but discrimination," Miller-El II, 545 U.S. at 265. The record was legally sufficient to establish a prima facie case that the State had engaged in discrimination against black members of the jury pool and satisfy step one of Batson.

The trial court in Mr. Kirksey's case should have next required the State to explain every single strike it exercised against African-American venirepersons: "Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately *the racial exclusion*." Batson, 476 U.S. at 94 (emphasis added.) . In Batson alone, this Court restated the prosecution's obligation to explain all of its strikes three additional times. Id. ("[T]he state must demonstrate that 'permissibly racially neutral selection criteria and procedures have produced *the monochromatic result*.'") (emphasis added); Id. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."); Id. at 98 n. 20 ("[T]he prosecutor must give a 'clear and reasonable specific' explanation of his 'legitimate reasons' for exercising the challenges.").

The lower court's holding that the State's volunteered denial of discriminatory intent (R. 1237-38) constituted a proffer of reasons for the remaining five strikes has

no legal basis. The State's general statements and broad assertions of non-discrimination, which fail to specify any individual jurors and do not even claim to cover all of the jurors struck, do not meet the legal requirements of "clear and reasonably specific" explanations required by Batson's second step. Id. at 98 n. 20; see also Miller-El II, 545 U.S. at 239 (2005); Batson, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections."). Furthermore, nothing in the record indicates that the State intended these comments to serve as a proffer under Batson, or that the trial court interpreted or evaluated them as such.[7] Under this Court's precedent, those five strikes were never explained or evaluated for racial discrimination.

Since Batson, this Court has continued to reiterate the scope of the obligation to provide race-neutral reasons for challenged strikes: "'Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors' *within an arguably targeted class*." Miller-El II, 545 U.S. at 239 (emphasis added); see also Hernandez v. New York, 500 U.S. 352, 358-59 (1991); Johnson, 545 U.S. at 168. These cases stand for the rule that, where the

[7]The State clearly distinguished between the specific reasons offered to rebut the prima facie case found with respect to Es.D, D.P., and B.R., and the generalized statement offered to cover "the majority of the black jurors that were struck, I believe." (R.1237-38.) Similarly, after the reasons were proffered, the trial court ruled that the three specified strikes were sufficiently race neutral, and that no prima facie case had been found with respect to the other five. (R. 1248-49.) The State's broad aggregate statement was never rebutted or evaluated as part of the trial court's Batson analysis.

defendant makes out a prima facie case of discrimination against a specific class, the prosecution has the burden of providing race-neutral explanations for all strikes of potential jurors in that class. While the party making the motion can use specific strikes to strengthen the initial claim of discrimination at step one of the Batson procedure, there is no requirement that a prima facie case of discrimination be established for each individual strike. Such a standard would be particularly unwieldy and insurmountable in cases where allegations of discrimination are largely based upon "a pattern of strikes against black jurors" and "the totality of the relevant facts" – factors this Court has explicitly required trial courts to consider in evaluating jury discrimination claims. Batson, 476 U.S. at 94, 97.

This Court has also recognized that, once a prima facie case has been found with respect to a certain class of veniremembers, the strength or weakness of the State's reasons for striking any member of that class can and should influence the scrutiny applied to the reasons proffered for other strikes. Snyder, 552 U.S. at 478 (finding that "if there [are] persisting doubts as to the outcome" regarding a Batson objection, "a court [is] required to consider the strike of [one juror] for the bearing it might have upon the strike of [another]"). Such a rule would be meaningless if a court were permitted to parse a prima facie finding, only requiring reasons for strikes of some class-members while leaving unexamined the relative strength or weakness of numerous similar strikes.

The Alabama Court of Criminal Appeals's ruling upheld the trial court's drastic heightening of the standard for establishing a prima facie case of discrimination with

respect to all class-members. This was error. See Johnson, 545 U.S. at 170.[8] A proper reading of Batson would have required the State to explain all eight strikes, rather than allowing the State to rebut the strong evidence of racial bias by offering explanations for just three.

The Alabama courts in this case failed to enforce this Court's clear precedent under Batson and standards for guarding against racial discrimination in jury selection. This Court should grant certiorari.

B. The Lower Court Failed to Properly Evaluate the State's Reasons for Striking Es.D., D.P., and B.R.

Though the Alabama Court of Criminal Appeals's review of the Batson rulings in this case was constrained by the trial court's erroneous ruling that the State need only explain three of its eight strikes of African-American veniremembers, the record contains ample evidence to demonstrate that the State's justifications for striking Es.D., D.P., and B.R. were pretextual, race-based, and unconstitutional. As described below, the lower court's consideration of these three strikes incorrectly applied this Court's precedent setting standards for evaluating reasons offered to rebut a prima facie case of discrimination under Batson. This Court is currently considering similar issues in Foster v. Chatman, No. 14-8349 and that forthcoming decision may warrant

[8] "We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Johnson, 545 U.S. at 170.

remand in this case.

1. Es.D.

The State asserted that it struck Es.D. because she suffered from health problems; she left "a lot of blanks on her questionnaire"; and she "seemed confused during questioning." (R. 1240-41, 1248.) These reasons are not supported by the record and applied equally to white jurors who the State allowed to serve.

During voir dire, Es.D. indicated that she had an upcoming doctor's appointment, was on medication to prevent chest pain, and might experience chest pains if she gets "exhausted or real hot or . . . in a real crowd. (R. 1146-47.) Es.D. also told the court she would not be worried about her health if she were chosen to serve. (R. 1148.) In comparison, white prospective juror T.P. referenced an upcoming medical appointment for a leg injury, stated that he could only sit for about forty-five minutes at a time before getting uncomfortable, and explained that his medication "makes me kind of sleepy when I get still and there's not a lot going on . . .[S]omebody may have to punch me every once in a while and wake me up." (R. 958-59, 961-62.)

The Alabama Court of Criminal Appeals found that the State's proffered justification regarding Es.D.'s health was sufficient to justify the strike, reasoning that "[a] concern over a potential juror's health problems is race neutral" and dismissing the disparate treatment claim on the grounds that "Es.D. and T.P. where [sic] not similarly situated regarding their health concerns."[9] Kirksey, 2014 WL 7236987, at *25.

[9]The differences between Es.D. and T.P. in fact made the latter's health concerns *more* incompatible with placement on a jury hearing a capital murder case; in deciding

This Court has rejected the idea that "no comparison of [potential jurors] is probative unless the situation of the individuals compared is identical in all respects." Miller-El II, 545 U.S. at 247 n.6. Furthermore, the lower court ignored the claim that the State engaged in disparate questioning of Es.D. compared to T.P. on the issue of health concerns[10] – although this Court has held that evidence of disparate questioning supports a conclusion that a proffered reason was in fact pretextual. Miller-El I, 537 U.S. at 344 ("It follows that, 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 [answers] would be pretextual."); Batson, 476 U.S. at 97 ("[T]he prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose."). Under these circumstances, the purported justification regarding Es.D.'s health was insufficient to rebut the strong prima facie case of discrimination and the lower court's incomplete review and contrary conclusion conflicts with binding decisions of this Court.

The State's claims that Es. D. was confused during questioning and left blanks

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otherwise, the lower court held that a black juror with a history of heart problems and a remote possibility of chest pains was less fit for jury service than a white juror whose leg ailment required frequent breaks from prolonged sitting, and whose medication made him drowsy and required someone to physically awaken him. Kirksey, 2014 WL 7236987, at *24.

[10]During voir dire, the State repeatedly asked Es.D. if her health would "be a problem," "make it hard," or lead her to be "worried about getting sick" while serving on the jury – but declined to ask T.P. any follow-up questions regarding his significant health limitations. (R. 961, 1145-47.)

on her questionnaire were further evidence of pretext and disparate treatment[11] – but the lower court declined to review these reasons at all. Instead, it erroneously held: "As long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made." Kirksey, 2014 WL 7236987 at *25 (citing Martin v. State, 62 So. 3d 1050, 1059 (Ala. Crim. App. 2010)).[12]

This holding directly conflicts with this Court's explicit precedent holding precisely the opposite: "a peremptory strike shown to have been motivated in substantial part by discriminatory intent" because one of multiple proffered justifications has been shown to be pretextual, can only be upheld if at all, where the

[11]While the State claimed to have struck Es.D. in part because she "left a lot of blanks on her questionnaire" (R. 1240), several seated white jurors also neglected to answer a significant number of questions on their questionnaires. See, e.g., K.G. and J.W. Questionnaires. The State's other proffered reason, that it "had real questions regarding how well [Es.D.] could understand" (R. 1247), was unsupported by the record, as none of Es.D.'s responses during voir dire indicate that she had any trouble understanding questions posed to her. Oddly, the State attempted to liken Es.D. to G.H., a juror questioned immediately before her, who was struck due to indications that he was cognitively impaired. (R. 1092-1102.) In fact, the only apparent trait shared by Es.D. and G.H. is race.

[12]The Alabama Court of Criminal Appeals frequently relies on this incorrect interpretation of Batson. See Martin v. State, 62 So. 3d 1050, 1059 ("[A]s long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason need not be made."); Shaw v. State, No. CR-10-1502, 2014 WL 3559389, at *11 (Ala. Crim. App. Jul. 18, 2014) (same); Hosch v. State, 155 So. 3d 1048, 1070-71 (Ala. Crim. App. 2013) (same); Riley v. State, 166 So. 3d 705, 726 (Ala. Crim. App. 2013) (same); Thompson v. State, 153 So. 3d 84, 124 (Ala. Crim. App. 2012) ("[W]hen more than one reason was given for striking some veniremembers, we need only find one race neutral reason among those asserted to find that the strike was race-neutral; we need not address any accompanying reasons that might be suspect.").

prosecution affirmatively demonstrates that the pretextual factor "was not determinative." Snyder, 552 U.S. at 485. Thus, even an otherwise race neutral justification may be insufficient to survive a Batson challenge where other reasons given show that race also played a role in the strike. See Miller-El II, 545 U.S. at 239-40; Batson, 476 U.S. at 96. Foster v. Chatman, No. 14-8349, a pending case before this Court, raises the issue of how trial courts should evaluate Batson claims when multiple reasons are proffered for the same strike;[13] the forthcoming decision may offer further guidance on this point and warrant remanding this case back to Alabama courts for further consideration.

The lower court's inadequate and incomplete review of the State's strike of Es.D. failed to comply with legal standards and constitutional requirements established by this Court's precedent. See Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (courts must consider "all of the circumstances that bear upon the issue of racial animosity" before concluding that prosecutor's proffered justifications for striking black jurors are race-neutral). As a result, the Alabama Court of Criminal Appeals violated Mr. Kirksey's rights under the Sixth and Fourteenth Amendments to the United States Constitution to be tried by a jury selected absent the taint of racial discrimination.

2. D.P. and B.R.

At trial, the prosecution stated that it struck both B.R. and D.P. due to their views regarding the death penalty, and that B.R. was additionally struck because she

[13] See *Brief of Petitioner* at 28-30, Foster v. Chatman, No. 14-8349 (U.S. Jul. 24, 2015).

had "some strange mannerisms" and was observed "smiling at the defendant." (R. 1239.) These purported justifications were weak and indicative of pretext; the prosecution engaged in disparate questioning of white and black veniremembers on the death penalty and the reasons regarding B.R.'s demeanor are not supported by the record.[14]

The Court of Criminal Appeals's decision upholding the strikes of B.R. and D.P. were highly suspect and exhibited evidence of racial discrimination. For one, both veniremembers expressed views on crime and evidentiary standards that favored the State (R. 982, 1115), and both affirmed that they could follow the court's instructions and fairly consider the death penalty despite any reservations. (R. 1110, 1115, 977, 978, 1112, 1114.) The lower court failed to consider these factors.

In reviewing the strikes of B.R. and D.P., the lower court only addressed the claim that black veniremembers were disparately questioned about the death penalty; after reviewing voir dire, the court held, "[n]othing in the record discloses that [other black veniremembers] J.H., R.K., or V.L. received disparate treatment. . . ." Kirksey, 2014 WL 7236987, at *29. In fact, the State aggressively questioned these black veniremembers regarding their death penalty views while making no effort to forcefully question or seek for-cause challenges against white veniremembers who indicated opposition to the death penalty. (See R. 507, 606-07, 730-33, 851-52,

[14]See Snyder, 552 U.S. at 479 (demeanor cannot serve as race-neutral basis for strike where record does not show trial judge made determination regarding prospective juror's demeanor).

1034-35.)[15] Furthermore, as discussed above, the trial court's failure to require the State to provide reasons for *all* of the strikes it used against African-American veniremembers largely shielded these additional strikes from scrutiny and impeded both courts' ability to engage in the complete review the constitution and this Court's precedent require to effectively evaluate whether illegal racial discrimination in jury selection has occurred. Snyder, 552 U.S. at 478 (finding that "if there [are] persisting doubts as to the outcome" regarding a Batson objection, "a court [is] required to consider the strike of [one juror] for the bearing it might have upon the strike of [another].").

The lower court's incomplete review of the State's strikes of D.P. and B.R. conflicts with this Court's requirement that proffered reasons be evaluated "in light of all relevant circumstances." Miller-El II, 545 U.S. at 231-32 (quoting Batson, 476 U.S.at 98); see also Snyder, 552 U.S. at 478. As a result, the Alabama Court of Criminal Appeals failed to protect Mr. Kirksey's right to be tried free of racial discrimination in jury selection under the Sixth and Fourteenth Amendments to the United States Constitution.

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[15]For example, African-American prospective juror R.K expressed reservations about the death penalty but indicated during individual voir dire that there were situations in which she would consider death an appropriate punishment. (R. 796-97.) The State responded by challenging this assertion repeatedly in an effort to elicit a response from R.K. that would render her ineligible to serve. (R. 797-803.) It then unsuccessfully moved to strike R.K. for cause before exercising a peremptory strike against her. In contrast, the State made no effort to aggressively question or pursue for–cause challenges against white veniremembers M.M., B.P., H.S., D.W. E.D., D.F., or C.H.–all of whom, like R.K. indicated personal opposition to the death penalty. See (R. 507, 606-07, 730-33, 851-52, 1034-35.)

In reviewing Mr. Kirksey's Batson claim alleging that racial discrimination tainted the jury selection process in his capital trial and rendered his conviction and death sentence unconstitutional, the Alabama Court of Criminal Appeals repeatedly misinterpreted and misapplied decades of this Court's precedent establishing standards and procedures for preventing and correcting precisely these types of constitutional violations. This Court is currently considering a request to reiterate Batson's requirements and procedures in Foster v. Chatman, No. 14-8349. Given the facts and legal claims asserted herein, this Court may consider holding this case pending resolution of Foster to determine whether the forthcoming opinion warrants an order granting certiorari, vacating Mr. Kirksey's conviction and death sentence, and remanding the case for the Alabama courts to reconsider Mr. Kirksey's Batson claim in light of the new decision. In the alternative, this Court should grant certiorari.

II. UNDER HURST V. FLORIDA, THIS COURT SHOULD GRANT CERTIORARI TO INVALIDATE THE DEATH SENTENCE IN THIS CASE BECAUSE IT WAS BASED ON A JUDGE'S INDEPENDENT FINDING OF AGGRAVATION RATHER THAN A JURY'S VERDICT.

Alabama's capital murder sentencing statute provides for a sentencing hearing before a jury, which results in an "advisory verdict" and a subsequent sentencing hearing before the trial judge. Ala. Code § 13A-5-46, 47. Only the trial judge holds the authority to impose sentence, and that sentence need only be based on the aggravating and mitigating factors found and weighed by the judge. Ala. Code § 13A-5-47(e).[16] The

[16]Ala. Code § 13A-5-47(e):
In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating

trial court is not restricted to or bound by the jury's findings regarding aggravating and mitigating factors and is even empowered to reach a different sentencing decision altogether. "While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court." Id.

In Hurst v. Florida, No. 14-7505, 2016 WL 112683, at *5 (Jan. 12, 2016), this Court applied its decision in Ring v. Arizona, 536 U.S. 584 (2002), to invalidate Florida's capital sentencing scheme under the Sixth Amendment to the United States Constitution. "The Florida sentencing statute does not make a defendant eligible for death until findings by the court that such person shall be punished by death . . . [T]he jury's function under the Florida death penalty statute is advisory only. The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires." Hurst, 2016 WL 112683, at *6 (internal quotations and citations omitted).

Alabama's death penalty scheme has exactly the same defect that was declared unconstitutional in Hurst. See Ring, 536 U.S. at 608 n.6 (both Florida and Alabama have "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations"); Harris v. Alabama, 513 U.S. 504, 508–09 (1995) (finding Alabama's death penalty statute to be "much like that of

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> circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Florida" because "[b]oth require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge"). Like in Alabama, Florida law allows a jury to reach a non-binding advisory sentencing recommendation but requires the judge to independently make "the critical findings necessary to impose the death penalty." Hurst, 2016 WL 112683, at *6; Fla. Stat. § 921.141(3).

In reversing Mr. Hurst's death sentence and declaring Florida's sentencing scheme unconstitutional, this Court explained:

> The maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. [... A] judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, Hurst's sentence violates the Sixth Amendment.

Hurst, 2016 WL 112683, at *6. The same can be said of Ronnie Kirksey.

The guilt phase verdict in this case did not include a finding of any aggravating factor that would make Mr. Kirksey eligible for the death penalty under Alabama law. (C. 164-65; R. 2321); Ala. Code § 13A-5-47(e). Mr. Kirksey's death sentence was imposed by a trial judge based on a judicial finding of one statutory aggravating factor (C. 189-95), under a sentencing scheme that does not require a jury finding of aggravation or a jury recommendation of death in order for the judge impose it. The jury's advisory sentencing recommendation did nothing to make Mr. Kirksey eligible for the death penalty, and the trial court's judicial finding of aggravation was the sole basis for enhancing Mr. Kirksey's sentence from life imprisonment without parole to death. Ala. Code § 13A-5-47(e).

"The Sixth Amendment requires a jury, not a judge, to find each fact necessary

to impose a sentence of death. A jury's mere recommendation is not enough." Hurst, 2016 WL 112683, at *3. These same Sixth Amendment concerns require action in Mr. Kirksey's death penalty case out of Alabama—the only state in the country where judges routinely impose death sentences in contradiction of advisory jury recommendations for life imprisonment. Woodward v. Alabama, 134 S. Ct. 405, 405 (2013) (Sotomayor, J., dissenting from denial of cert.). Mr. Kirksey requests that this court grant certiorari, vacate his death sentence, and remand the case for further proceedings in accordance with the recent decision in Hurst v. Florida.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant certiorari to the Alabama Court of Criminal Appeals and declare that Mr. Kirksey's constitutional rights were violated.

Respectfully Submitted,

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January 21, 2016