No. 12-308

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2012

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**COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL, STATE OF ALABAMA, Petitioners,**

**v.**

**VERNON MADISON, Respondent.**

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

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 12, 2012

**CAPITAL CASE**

## QUESTION PRESENTED

**(Rephrased)**

This is a case where an African-American defendant was charged with the capital murder of a white police officer in Mobile County, Alabama. The District Attorney, whose office had been found to violate Batson seven times in the eight years between 1986 (Batson) and 1994 (this trial), including previously in this very case, used his peremptory strikes to remove nearly half of the qualified African-American veniremembers, three of whom were never questioned by the District Attorney at all. When defense counsel failed to present additional evidence of "bias," the trial court refused to find a prima facie case of discrimination. This ruling was upheld on direct appeal by the Alabama Court of Criminal Appeals, which, after failing to consider relevant facts in support of a prima facie case, concluded that Mr. Madison had failed to establish "purposeful discrimination."

In federal habeas corpus proceedings, the district court rejected Mr. Madison's Batson claim. On appeal, after invoking the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and setting forth the appropriate standard of review, the Eleventh Circuit Court of Appeals determined that the state court's decision imposed a higher burden on Mr. Madison than that set forth in Batson v. Kentucky, 486 U.S.

79 (1986), in contravention of clearly established federal law, and remanded the case for further proceedings consistent with the final two steps of the Batson inquiry. Thus, the question presented is:

> Is certiorari appropriate to review the Eleventh Circuit Court of Appeals' opinion, where the court gave appropriate deference to the state court decision, applied the correct legal standard and properly determined that habeas corpus relief was required based on the facts in this case?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes



Rules

## INTRODUCTION

This death penalty case[1] is from Mobile County, Alabama, where no less than seven cases were reversed as a result of the District Attorney's racially discriminatory jury selection practices between 1986 – when Batson[2] was announced – and 1994 – when this trial occurred. During this same time period, the District Attorney's office was found to have violated Swain v. Alabama, 380 U.S. 202 (1965), by engaging in systematic, intentional exclusion of African Americans from jury service. Jones v. Davis, 906 F.2d 552 (11th Cir. 1990). Mr. Madison's first conviction and death sentence were reversed after a state appellate court found that this same District Attorney's office, in front of this same judge, had engaged in illegal racially discriminatory jury selection when it removed all seven of the qualified African-American veniremembers. The District Attorney's office similarly used peremptory strikes in this trial to remove nearly half of the qualified African-American veniremembers, including three veniremembers who were never questioned by the

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[1]The death-qualified jury in this case returned a verdict sentencing Mr. Madison to life without parole. However, the trial judge rejected this life verdict and instead sentenced Mr. Madison to death. Alabama is one of only three states – the other two are Delaware and Florida – to permit a trial judge to reject a jury's life verdict and instead impose a sentence of death, and the only one to do so without meaningful standards or oversight.

[2]Batson v. Kentucky, 476 U.S. 79 (1986).

District Attorney at all.

When defense counsel objected and argued that there was a prima facie case of discrimination, the trial court repeatedly requested that the defense present additional support for its Batson motion, including, inappropriately, evidence of "bias." Even though Mr. Madison had unquestionably satisfied the very low burden required to permit an "inference" of discrimination, the trial court refused to find a prima facie case under Batson. On direct appeal, the Alabama Court of Criminal Appeals affirmed this decision and cited to the Batson three-step inquiry before finding that, despite the significant evidence produced by Mr. Madison in support of a prima facie case, only one piece of evidence – the District Attorney's failure to question three veniremembers – arguably could support a prima facie case. Focusing on the number of African Americans on Mr. Madison's jury, the state court determined that no prima facie case existed. In so doing, the state court unreasonably applied a much higher burden on Mr. Madison than that required by Batson, in direct contravention of clearly established caselaw. This is what the Eleventh Circuit Court of Appeals properly determined, before it remanded the case for completion of the final two steps of the Batson analysis.

In requesting this Court's intervention, Petitioners focus on how long it has taken this case to get to the Eleventh Circuit, and about the unfairness of having to

now respond to legitimate concerns about racially discriminatory jury selection practices at Mr. Madison's capital trial, as well as advancing a narrative that suggests that a little discrimination is acceptable, as long as it is not too much. Of course, had the prosecutor not engaged in misconduct that resulted in two prior reversals, and had he not unjustifiably excluded nearly half of the qualified African-American veniremembers, all of this litigation could have been avoided.

But, even more importantly, as this Court has repeatedly made clear, the issue of racially discriminatory jury selection is about more than just Vernon Madison or the State's interest in a criminal conviction, it is about the integrity of the criminal justice system. The victims of discriminatory jury selection practices are all of the citizens of Mobile county, and most critically, African-American citizens of Mobile county, who historically have not had the same opportunities to participate in jury service as white citizens. The Batson framework was designed to give teeth to the Equal Protection Clause and ensure that not **one** person is denied the opportunity to participate in jury selection on account of her race: "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." Powers v. Ohio, 499 U.S. 400, 406 (1991) (citing Duncan v. Louisiana, 391 U.S. 145, 147-158 (1968)).

Mr. Madison produced evidence which constituted a prima facie case of

discrimination. Both the trial court and the Alabama state appellate court not only refused to engage in the proper Batson analysis, but employed an analysis that was contrary to Batson's directive, and the Eleventh Circuit appropriately granted habeas relief and remanded the case for further proceedings. Nothing in this Court's decisions in Holland v. Jackson and Woodford v. Viscotti, both of which deal with fact-intensive determinations about the prejudice prong of the Strickland standard of ineffectiveness, bears on this case. Certiorari should be denied.

## OPINIONS BELOW

The Alabama Court of Criminal Appeals affirmed Mr. Madison's conviction and death sentence on January 17, 1997. That decision is reported at Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997). The Alabama Supreme Court affirmed after independently reviewing one of Mr. Madison's claims and summarily denying relief on the others. Ex parte Madison, 718 So. 2d 104 (Ala. 1998).

The federal district court's decision denying Mr. Madison federal habeas relief is reported as Madison v. Allen, No. 1:09-00009-KD-B, 2011 WL 1004885 (S.D. Ala. March 21, 2011). The Eleventh Circuit's decision affirming in part and reversing in part is reported at Madison v. Commissioner, 677 F.3d 1333 (11th Cir. 2012).

## JURISDICTION

The State of Alabama filed a petition for writ of certiorari with this Court on

September 10, 2012. The Court has jurisdiction to consider the State's petition pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

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

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

28 U.S.C. §2254 states in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

On the evening of April 18, 1985, Vernon Madison and his mother visited the residence of Cheryl Greene at 1058 Etta Avenue, in Pritchard, Alabama. (Tab R-10, Vol. 3, at 220, 264, 342.) Mr. Madison had been dating and living with Ms. Greene until recently, and he stopped by the home to retrieve belongings that he had left

behind after moving. (Tab R-10, Vol. 3, at 220, 264; Tab R-11, Vol. 4, at 540.)

When Mr. Madison arrived at the home, a dark Dodge Aspen was parked outside the residence with a man sitting inside. (Tab R-10, Vol. 3, at 268-69, 329.) The man, who was not in uniform and whose vehicle was unmarked (Tab R-10, Vol. 3, at 244, 289, 327), asked Mr. Madison to leave the area and subsequently wound up arguing with Mr. Madison (Tab R-10, Vol. 3, at 272; Tab R-11, Vol. 4, at 558-59). During the incident, Mr. Madison approached the vehicle and shot twice through the car window. (Tab R-10, Vol. 3, at 207-08.) The victim was struck and later died from his injuries. (Tab R-10, Vol. 4, at 416-17, 463.)

At trial, the State presented evidence that the victim was Corporal Julius Schulte of the Mobile Police Department. (Tab R-10, Vol. 3, at 341.) Mr. Schulte, a juvenile officer, had been dispatched to the home to follow up on a report of a missing child called in by Cheryl Greene. (Tab R-10, Vol. 3, at 340-42.) By the time he arrived at the residence, Kimberley Greene – Cheryl Greene's daughter – had returned home with a friend. (Tab R-10, Vol. 3, at 219, 263-64.) Nonetheless, Mr. Schulte waited at the scene for Mr. Madison and his mother to leave, after confirming that the child reported missing was in fact home. (Tab R-10, Vol. 3, at 226-27.)

Mr. Madison made statements to law enforcement about the incident after his arrest. Among other information, Mr. Madison relayed that he suffered from mental

illness, and that he had been diagnosed as paranoid schizophrenic and seen by psychiatrists and psychologists while incarcerated in Mississippi. (Tab R-10, Vol. 4, at 484, 517; Tab R-11, Vol. 4, at 571.)

On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr. Madison's conviction and sentence after concluding that the prosecution had illegally struck African American jurors because of their race, in violation of Batson. Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987).

On September 14, 1990, Mr. Madison was again convicted of capital murder, and the trial court imposed a sentence of death. Madison v. State, 620 So. 2d 62, 63 (Ala. Crim. App. 1992). The Alabama Court of Criminal Appeals reversed on the ground that the State had improperly elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

After his convictions for capital murder were overturned twice for the reasons described above, Mr. Madison was tried for a third time in April of 1994. During jury selection at that trial, the prosecution used its peremptory strikes to remove six of thirteen African-American veniremembers from the jury. (Tab R-6, Vol. 2, at 150.)

Defense counsel objected to the strikes, which he argued were based on the jurors' race in violation of Batson. (Tab R-6, Vol. 2, at 149-56.) In addition to the trial judge's knowledge that the District Attorney had previously engaged in racially discriminatory jury selection in this very case, defense counsel cited several factors establishing a prima facie case of discrimination: (1) the number of strikes exercised by the prosecution against African-American potential jurors (Tab R-6, Vol. 2, at 149-50); (2) the lack of questioning of the struck jurors by the prosecution (Tab R-6, Vol. 2, at 154); (3) the heterogeneity of the struck jurors (Tab R-6, Vol. 2, at 153-54); and (4) the fact that Mr. Madison was African American like the struck jurors, and that he was accused of killing a white police officer (Tab R-6, Vol. 2, at 150, 155).

Though there is no question that these facts permit an "inference" of discrimination, the trial court demanded that Mr. Madison provide more evidence in support of his objection, including evidence of "bias." (Tab R-6, Vol. 2, at 152, 154-55.) Ultimately, the trial court denied defense counsel's motion without requiring the prosecution to give reasons for its strikes. (Tab R-6, Vol. 2, at 156.)

At the guilt phase of trial, Mr. Madison did not deny that he shot the victim. Rather, he sought to defend on two grounds: (1) that he did not know the victim, who was not in uniform and who arrived in an unmarked vehicle, was a police officer (Tab

R-9, Vol. 2, at 180-83; Tab R-13, Vol. 5, at 628, 641, 645),[3] and (2) that he acted in self defense after exchanging heated words with the victim, whom Mr. Madison believed was going to use his gun (Tab R-9, Vol. 2, at 180, 184-85; Tab R-13, Vol. 5, at 645). On April 21, 1994, the jury found Mr. Madison guilty of capital murder. (Tab R-16, Vol. 5, at 704-05.)

It was undisputed at the penalty phase of trial that Mr. Madison suffered from a mental illness marked by paranoid delusions: he had experienced persecution delusions since he was a teenager; he was out of touch with reality at the time of the crime and unable to gather his thoughts; and he could not appreciate fully the criminality of his conduct. (Tab R-20, Vol. 5, at 718, 720, 724, 727, 736, 754.) Mr. Madison's struggle with mental illness has been observed since he was an adolescent, including by prison psychiatrists in Mississippi as documented in medical records introduced by the defense. (Tab R-20, Vol. 5, at 713, 718.) To control his illness, Mr. Madison had been prescribed numerous anti-psychotic medications. (Tab R-20, Vol. 5, at 721.) In addition to introducing evidence of Mr. Madison's mental illness, the defense also presented testimony from Mr. Madison's mother asking the jury to

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[3] At the time of the offense, Mr. Madison could only be guilty of capital murder if he knew that the victim was a police officer on duty. See Ex parte Murry, 455 So. 2d 72, 78 (Ala. 1984), superseded by statute as stated in Ex parte Jackson, 614 So. 2d 405, 408 (Ala. 1993).

spare his life, from a friend testifying to positive changes demonstrated by Mr. Madison during his time in prison, and from Mr. Madison expressing remorse for the offense. (Tab R-20, Vol. 5, at 756-66.)

At the conclusion of the penalty phase, the jury reached an 8-4 verdict in favor of life without parole. (Tab R-26, Vol. 5, at 800.) However, on June 16, 1994, Judge Ferrill McRae of the Mobile County Circuit Court overruled the jury's verdict and imposed a sentence of death. (Tab R-29, Vol. 6, at 25.) In his sentencing order, Judge McCrae found no statutory or nonstatutory mitigating circumstances supporting the jury's verdict of life without parole. (Tab R-48, Vol. 12.)

On appeal, Mr. Madison argued that the prosecution had illegally struck potential jurors because of their race, in violation of Batson. (Tab R-30, Vol. 7, at 31-33.) The Alabama Court of Criminal Appeals denied relief after concluding that Mr. Madison had not "established purposeful racial discrimination," and therefore no reasons to rebut a prima facie case were required. Madison, 718 So. 2d at 102. The state court failed to address Mr. Madison's argument that the factual circumstances of his case – that he was an African American accused of shooting a white police officer – raised an inference of discrimination, nor did it address the prosecutor's history of discrimination. Mr. Madison raised his Batson claim before the Alabama Supreme Court (Tab R-35, Vol. 8, at 9-20, 39-41, 46-50), which denied relief without

addressing the Batson claim. Ex parte Madison, 718 So. 2d 104 (Ala. 1998).

After exhausting his postconviction remedies in state court, Mr. Madison filed a petition for habeas corpus relief, in which he raised several of the claims that he had litigated on direct appeal. The district court rejected Mr. Madison's Batson claim after block-quoting the Court of Criminal Appeals's decision and engaging in almost no independent analysis of the issue. Madison, 2011 WL 1004885, at *33-35. Like the state courts, the district court did not address the racial dynamics at Mr. Madison's trial or the Mobile County District Attorney's history of discrimination in his case. The Eleventh Circuit Court of Appeals granted a Certificate of Appealability on three issues, including the Batson issue. In its' decision affirming in part and reversing in part, the lower court first articulated the appropriate standard of review, that federal habeas relief is limited to cases where the state court adjudication results in a decision that was "contrary to or involved an unreasonable application of, clearly established Federal law." Madison v. Commissioner, 677 F.3d 1333, 1335 (11th Cir. 2012) (citing 28 U.S.C. §2254(d)). With regard to Mr. Madison's Batson claim, the Court first identified the relevant facts and the governing law – Batson v. Kentucky, 476 U.S. 79 (1986) – before analyzing the state court opinion in the context of the AEDPA and concluding that the state court "increased Madison's prima facie burden beyond what Batson requires," Madison, 677 F. 3d at

1338, and therefore the "state-court decision falls within the 'contrary to' clause of § 2254(d)(1)." Madison, 677 F.3d at 1339. After undertaking a *de novo* review of the claim, the lower court determined that "Madison met his burden of establishing a prima facie case," and remanded the case for completion of the final two steps of the Batson proceedings. Madison, 677 F.3d at 1339.

## REASONS FOR DENYING THE WRIT

### A. The Eleventh Circuit's Decision Represents the Proper Application of Law to the Facts in Determining that the State Court's Decision Was Contrary to Clearly Established Federal Law.

Under the burden-shifting framework adopted by this Court in Batson, the opponent of a peremptory strike bears the initial responsibility of "ma[king] out a prima facie case of racial discrimination." See Purkett v. Elem, 514 U.S. 765, 767 (1995).[4] This threshold burden is one of *production* and not *persuasion* and is easily satisfied: a defendant makes a prima facie showing by raising a mere "inference" of discrimination. Batson, 476 U.S. at 96; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (describing burden of production at first step as "minimal"). Indeed, this Court has recognized that the burden should not "be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of

[4] It is only at the third stage of Batson that "'the opponent of the strike [must] prove[] purposeful racial discrimination.'" Johnson v. California, 545 U.S. 162, 168 (2005) (quoting Purkett, 514 U.S. at 767).

which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." Johnson, 545 U.S. at 170. Rather, a defendant must only "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Id.

Petitioners pay lip service to this standard, but then argue that the "totality of the relevant facts made it extremely difficult for [Mr. Madison] to argue for that inference." Pet. at 24. In making this argument, Petitioners make a few half-hearted attempts to discredit the evidence presented to the state courts in support of a prima facie case but then return to their primary argument: because the prosecutor did not exclude all of the qualified African Americans, a prima facie case of discrimination does not exist. See Pet. at 24, 26, 28. But the evidence presented to the state courts easily requires an inference of discrimination, warranting further proceedings. Johnson, 545 U.S. at 170. And that inference is not defeated by the fact that some African Americans remained on the jury. Perhaps more to the point, Petitioners' arguments about the facts only reinforces the inappropriateness of certiorari in this case. See Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the missapplication of a properly stated rule of law.").

First, the prosecutor removed six of thirteen – or nearly half (46%)– of the

qualified African-American veniremembers,[5] (Tab R-6, Vol. 2, at 149-50). Second, these jurors were men and women of various ages and occupations,[6] who shared only the characteristic of race. (Tab R-6, Vol. 2, at 153-54.) Cf. Miller-El v. Cockrell, 537 U.S. 322, 346 (2003) (prosecutor's use of jury shuffle when only known, and shared, characteristic of veniremembers was race, "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection").

Third, as to three of the struck African-American veniremembers, the prosecutor posed *no* questions at all.[7] Madison, 718 So. 2d at 102. Indeed, in contrast to the "substantial" information Petitioner argues was obtained from these veniremembers, two of them – S.S. and G.A. – said nothing at all during voir dire.[8]

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[5]The low percentage of African Americans on the venire highlights the prosecution's disproportionate use of its strikes: although African Americans accounted for only twenty-five percent of the venire, the prosecutor used thirty-three percent of its strikes to remove qualified black jurors. See Batson, 476 U.S. at 97 ("[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.").

[6]Trial counsel supported this argument with evidence that the struck jurors had diverse educational backgrounds and included a laborer, the director of a housing board, a food server, and an industrial worker. (Tab R-6, Vol. 2, at 154.) The jurors also included four men and two women, all of varying ages. (Tab R-6, Vol. 2, at 154.)

[7]It is worth noting that the prosecutor's entire voir dire spanned less than 7 transcript pages. (Tab R-6, Vol. 2, at 77-83.)

[8]Presumably, G.A. and S.S. responded to the Court's directive to give their occupation and their spouses' occupation, if married, (Tab R-6, Vol. 2, at 143-44),

As even the state court acknowledged, Madison, 718 So. 2d at 102, a prosecutor's failure to question a veniremember about an area of concern is a relevant piece of information to consider when determining whether the defendant has produced evidence which permits an inference of discrimination. See Miller-El v. Dretke, 545 U.S. 231, 244 (2005) (prosecutor would have asked further questions if legitimately concerned about veniremember's views); Batson, 476 U.S. at 97 (prosecutors's questions and statements during voir dire relevant to prima facie case determination).

Fourth, this case involved an African-American man charged with capital murder for shooting a white police officer in Mobile, Alabama and the jurors illegally struck by the State are also African American. (Tab R-6, Vol. 2, at 155.)[9] While Petitioners agree that racial dynamics such as these are "no doubt relevant," in some cases, Petitioners contend that these dynamics are not relevant here because the jury "included a much larger share of African Americans than the pool from which it was

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but whatever response the veniremembers gave is not contained in the record. Of course, to the extent that the veniremembers' response to a yes/no question provided information to the attorneys, see Pet. at 25 (characterizing such responses as providing "important data no matter how they answered,"), the prosecutor failed to take the opportunity to pose any questions to three of these struck veniremembers about any areas of concern. (See Tab R-6, Vol. 2, at 77-83.)

[9]Additionally, defense counsel expressed concern that Mr. Madison's girlfriend was white, a fact which could emerge at trial and which certain jurors "may not like." (Tab R-6, Vol. 2, at 155.)

drawn." Pet. at 26. But the relevance of these racial dynamics to the prima facie case determination – see Johnson, 545 U.S. at 167 – does not turn on whether the prosecutor illegally excluded all of the African-American citizens who walked into that Mobile county courtroom, or just some of them.

Finally, in addition to this evidence, Mr. Madison's Batson motion was supported by a history of racial discrimination in jury selection by the Mobile County District Attorney's Office. In his arguments before the Alabama Court of Criminal Appeals, Mr. Madison called attention to the fact that in the **eight** years between 1986 (Batson) and 1994 (Mr. Madison's third trial), this same District Attorney's office had been found to violate Batson **seven** times.[10] See Miller-El v. Dretke, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). But this history included more than just a "string-cite," to

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[10]See, e.g., Jessie v. State, 659 So. 2d 167 (Ala. Crim. App. 1994); Carter v. State, 603 So. 2d 1137 (Ala. Crim. App. 1992); Jackson v. State, 557 So. 2d 855 (Ala. Crim. App. 1990); Harrell v. State, 571 So. 2d 1269 (Ala. Crim. App. 1990); Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987); White v. State, 522 So. 2d 323 (Ala. Crim. App. 1987); Williams v. State, 507 So. 2d 566 (Ala. Crim. App. 1987). During this same time period, the Eleventh Circuit Court of Appeals found that this District Attorney's office had violated Swain v. Alabama, 380 U.S. 202 (1965), by engaging in systematic, intentional exclusion of African Americans from jury service. Jones v. Davis, 906 F.2d 552 (11th Cir. 1990). This is precisely the type of evidence that this Court accepted as relevant in the Miller-El decision cited by Petitioners. See Miller-El v. Dretke, 545 U.S. 231at 263-65 (citing to testimony from Swain hearing in 1986 as evidence of "systematic practice" to exclude racial minorities from serving on juries).

cases. Pet. at 27. This history was directly connected to Vernon Madison by virtue of the prosecution's illegal race-based use of its peremptory challenges at Mr. Madison's first trial, Madison, 545 So. 2d 94, a fact of which the judge at the present trial (who presided at the first trial) was undoubtedly aware.

This combination of factors was undoubtedly more than "sufficient to permit the trial judge to draw an inference that discrimination has occurred." Johnson, 545 U.S. at 170.

**B. This Case Does not Warrant this Court's Intervention.**

The primary reason cited by Petitioners for this Court's intervention appears to be that the Eleventh Circuit's proper application of the provisions of the AEDPA and controlling federal caselaw to the facts of this case somehow raises a "systemic concern[]" that requires summary reversal. Pet. at 14-15. Petitioners have not identified a conflict between the Eleventh Circuit Court of Appeals' decision and any other state or federal court on "an important federal question," Sup. Ct. R. 15(b), nor have they identified an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 15(c). For the reasons described infra, the cases cited by Petitioner simply do not support intervention in this case. But more critically, Petitioners' description of the case varies a great deal from what the Eleventh Circuit actually did.

In its decision affirming in part and reversing in part, the lower court first articulated the appropriate standard of review, that federal habeas relief is limited to cases where the state court adjudication results in a decision that was "contrary to or involved an unreasonable application of, clearly established Federal law." Madison, 677 F.3d at 1335 (citing 28 U.S.C. §2254(d)). With regard to Mr. Madison's Batson claim, the Court first identified the relevant facts and the governing law – Batson v. Kentucky, 476 U.S. 79 (1986) – before analyzing the state court opinion in the context of the AEDPA and concluding that the state court "increased Madison's prima facie burden beyond what Batson requires." Madison, 677 F.3d at 1338. Citing Williams v. Taylor, the lower court determined that a "state court decision is contrary to clearly established law under § 2254(d)(1) when it imposes a burden on the petitioner that is higher than what Supreme Court precedent requires." Id. (citing Williams, 529 U.S. 362, 405-06 (2000) (O'Connor, J., majority opinion)). Because, in this case the state court "demanded that Madison establish purposeful discrimination at the outset rather than merely produce evidence sufficient to raise an inference of discrimination, . . . the state-court decision falls within the 'contrary to' clause of § 2254(d)(1)." Madison, 677 F.3d at 1339. After undertaking a *de novo* review of the claim, the lower court determined that "Madison met his burden of establishing a prima facie case," and remanded the case for completion of the final

two steps of the Batson proceedings. Madison, 677 F.3d at 1339.

This is precisely the type of ordinary case which this Court has generally avoided. See Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which we are *most* inclined to deny certiorari."); Forsyth v. City of Hammond, 166 U.S. 506, 514-15 (1897) ("[W]hile this [certiorari] power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeals, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.") This case simply does not present an adequate basis for this Court's intervention, and as such, the petition should be denied.

**C. The Cases Cited by Petitioners Do not Support Intervention by this Court.**

Petitioners also attempt to create a "pattern" from a string cite of cases which,

they argue, have all raised "systemic concerns" requiring summary reversal by this Court, including "two previous AEDPA summary reversals," Pet. at 14, and then recharacterize the facts of Mr. Madison's case to fit into the purported "pattern." But these cases do not support Petitioners' position. As an initial matter, none of the eight cases cited by Petitioners involve a pattern, or even a case, from the Eleventh Circuit Court of Appeals.[11] So whatever institutional concerns may have motivated this Court's intervention in those cases, they are not present here. See, e.g., Cavazos v. Smith, 132 S. Ct. 2, 7 (2011) ("This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. . . .Its refusal to do so necessitates this Court's action today.").

Moreover, unlike Mr. Madison's case, none of the cases on which Petitioners

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[11]Three of these cases are out of the Sixth Circuit, see Parker v. Matthews, 132 S. Ct. 2148 (2012) (per curiam); Bobby v. Dixon, 132 S. Ct. 26 (2011) (per curiam); Holland v. Jackson, 542 U.S. 649 (2004) (per curiam), two of the cases are out of the Third Circuit, see Coleman v. Johnson, 132 S. Ct. 2060 (2012) (per curiam); Wetzel v. Lambert, 132 S. Ct. 1195 (2012) (per curiam), two are out of the Ninth Circuit, see Cavazos v. Smith, 132 S. Ct. 2 (2011) (per curiam); Woodford v. Viscotti, 537 U.S. 19 (2002) (per curiam), and one is out of the Seventh Circuit. See Hardy v. Cross, 132 S. Ct. 490 (2011) (per curiam).

rely involve a state court's failure to employ the correct legal standard in assessing whether a prima facie case of jury discrimination could be inferred. See, e.g., Parker v. Matthews, 132 S. Ct. 2148 (2012) (per curiam) (Jackson v. Virginia claim); Coleman v. Johnson, 132 S. Ct. 2060 (2012) (per curiam) ( Jackson v. Virginia claim); Wetzel v. Lambert, 132 S. Ct. 1195 (2012) (per curiam) (Brady claim); Hardy v. Cross, 132 S. Ct. 490 (per curiam) (2011) (unavailability for purposes of Confrontation Clause claim); Bobby v. Dixon, 132 S. Ct. 26 (2011) (per curiam) (Miranda v. Arizona claim); Cavazos v. Smith, 132 S. Ct. 2 (2011) (per curiam) (Jackson v. Virginia claim).

Both Viscotti and Jackson, which Petitioners cite as the primary authority for summary reversal here, involve a state court determination of the prejudice prong of Strickland v.Washington, 466 U.S. 688 (1984). Beyond the obvious differences, these cases are not helpful to Petitioners for two reasons: first, the California and Tennessee state courts in those cases both correctly articulated, defined and applied the correct burden of proof; and second, the Ninth and Sixth circuits refused to engage in a proper AEDPA analysis by first reconciling the entirety of the state court opinion before concluding that habeas relief was warranted. But neither of those things happened here.

In both Viscotti and Jackson, the state courts correctly identified and defined

the Strickland standard for determining prejudice. 537 U.S. at 23-24; 542 U.S. at 654. Both courts then applied this standard and determined that the attorney's conduct did not meet the Strickland standard of ineffectiveness. 537 U.S. at 21; 542 U.S. 651, 654-55. In contrast, here, the Alabama state court correctly identified the three-step inquiry, Madison, 718 So. 2d at 101, but then failed to place the appropriate burden on Mr. Madison – merely to produce evidence permitting an inference – and instead unreasonably placed the much higher burden on him to establish purposeful discrimination. In resolving Mr. Madison's claim, the state court refused to consider the racial dynamics at trial, the District Attorney's history of discrimination, the heterogenity of the struck jurors, and the pattern of strikes, as evidence that was produced and supported an inference of discrimination, instead concluding that the "only evidence that could arguably lead to an inference of discrimination was a lack of questions or meaningful questions." Madison, 718 So. 2d at 102. After considering "only" this evidence, and contrasting it with the "percentage of blacks who served on the jury relative to both the initial panel and the population of the county," the state court determined that the trial court's decision that Mr. Madison had not "established purposeful discrimination . . . was not clearly erroneous." Id.

It was the state court's unreasonable imposition of a much higher burden than

what Batson requires, in contravention of clearly established federal law, that required habeas corpus relief from the Eleventh Circuit. Madison, 677 F.3d at 1338-39. In contrast, in both Viscotti and Jackson, the Ninth and Sixth circuits, respectively, failed to abide by the limitations of the AEDPA by ignoring the fact that the state court opinions framed the standard and evidentiary burden in a way that was consistent with Strickland. 537 U.S. at 24; see also Jackson, 542 U.S. at 654.

Because the Alabama state court failed to employ the proper "inference" standard, and instead placed a higher burden on Mr. Madison than that required by Batson, the decision of the Eleventh Circuit Court of Appeals, properly applying this Court's caselaw and the AEDPA, does not warrant this Court's intervention.

## CONCLUSION

Every single African American who walked into the Mobile County Courtroom on the first day of Vernon Madison's trial in 1994 had the right not to be removed by virtue of his or her race. The prosecutor from the Mobile County District Attorney's office – which had been found to violate Batson seven times in eight years, including in this case – removed nearly half of the qualified African-American veniremembers, including three who were not asked a single question by the District Attorney. Despite evidence of a racialized trial – Mr. Madison is black and the victim was a white police officer – the trial court refused to conclude that the totality of this

evidence permitted an inference of discrimination, unreasonably requiring Mr. Madison instead to show "evidence of bias." (Tab R-6, Vol. 2, at 152-55.)

Affirming this ruling on direct appeal, and as evidenced by its opinion, the state court similarly required Mr. Madison to *prove* discrimination. This ruling was contrary to Batson. In remanding this case for further proceedings, the Eleventh Circuit properly applied the correct standard – 28 U.S.C. §2254(d) – and concluded that habeas corpus relief was warranted. No basis for certiorari exists and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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