No. _____

In the
Supreme Court of the United States

TONY PATTERSON, WARDEN,
HOLMAN CORRECTIONAL FACILITY, ET AL.,
Petitioners,
v.
RICKY ADKINS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

This petition raises a question about the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 (2006), that is similar to the questions that prompted this Court to unanimously reverse the Ninth Circuit in *Harrington v. Richter*, 131 S. Ct. 770 (2011), and *Johnson v. Williams*, 133 S. Ct. 1088 (2013). The question, applied to the underlying constitutional claim and facts, is:

> When a state court cites and applies the correct standard from *Batson v. Kentucky*, 476 U.S. 79 (1986), for assessing whether a habeas petitioner has established discrimination in jury selection, does the state court's failure to expressly address "all relevant circumstances" in a written opinion mean that the state court's decision is "unreasonable" and entitled to no deference under the Antiterrorism and Effective Death Penalty Act?

PARTIES TO THE PROCEEDING

Petitioners are the Warden of Holman Prison, Tony Patterson, and the Commissioner of the Alabama Department of Corrections, Kim Thomas. They were respondents-appellees in the court below. Respondent is Ricky Dale Adkins who is in state custody and was the petitioner-appellant in the court below.

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INTRODUCTION

The lower court's decision is on the wrong side of a circuit split about the way AEDPA operates on federal habeas review when a state court denies a constitutional claim in an abbreviated or poorly written opinion. In *Johnson v. Williams*, 133 S. Ct. 1088 (2013), and *Harrington v. Richter*, 131 S. Ct. 770 (2011), this Court made clear that deference under AEDPA applies to state-court decisions that are memorialized in brief written opinions; indeed, deference applies to decisions that lack any written opinion at all. The Court held that these state-court decisions must be considered "on the merits" for the purposes of AEDPA, regardless of how they are written. The operative principle behind *Johnson* and *Harrington* is that the deference due under AEDPA applies not to a state court's articulated reasoning, but its conclusions.

In this case, the Eleventh Circuit denied deferential review to the underlying state-court decision solely because the state court's written opinion did not mention every relevant fact in its abbreviated legal analysis. App. 25a-29a. The court accepted that the constitutional claim fell within AEDPA's coverage because the state courts denied it "on the merits," App. 16a, but the Eleventh Circuit nonetheless proceeded to adopt, by other means, precisely that mode of analysis that *Harrington* and *Johnson* forbade. The Eleventh Circuit ruled that the state court's failure to fully articulate its reasoning in its written opinion amounts to an "unreasonable" decision under both prongs of 28 U.S.C. 2254(d). App. 22a-24a, 28a-29a. On that basis, the court declared

itself unconstrained by AEDPA and the deference it demands. App. 29a. Having unburdened itself of AEDPA, the court then proceeded to find a constitutional violation under de novo review. App. 29a-37a.

The majority of federal circuits have handled this situation in a different manner. When faced with a state-court decision on the merits that is accompanied by an abbreviated written opinion – or even no written opinion at all – these courts undertake a deferential review, whereby they consider the *ultimate conclusion* reached, and whether *that* was reasonable. The First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have all refused to review de novo a state court's findings in similar circumstances, and five of those circuits have applied that rule to the specific constitutional claim at issue here. Only the Ninth Circuit has embraced the Eleventh Circuit's model of circumventing deferential review by declaring a decision to be "unreasonable" merely because of the way the state court's opinion was written.

This issue is important and dispositive. As this Court recognized in *Harrington* and *Johnson*, state-court judges face crushing case loads, and, of necessity, must limit their time in crafting written opinions. If a state court's failure to fully explain its reasoning becomes the basis upon which a state court's findings are declared unreasonable and reviewed de novo, few long-final convictions will receive the deference they are due. The Court should grant certiorari and reverse.

OPINIONS BELOW

The opinion of the court of appeals granting the habeas petition (App. 1a-58a) is reported at 710 F.3d 1241. The order of the district court denying the habeas petition (App. 59a-77a) is unreported. The magistrate judge's report and recommendation, which recommended the denial (App. 103a-153a), is also unreported. The opinion of the Alabama Court of Criminal Appeals (App. 78a-94a) is reported at 639 So. 2d 515.

JURISDICTION

The court of appeals issued its opinion on February 27, 2013. App. 1a. The court of appeals denied rehearing and rehearing en banc on April 16, 2013. App. 101a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall deprive . . . any person within its jurisdiction the equal protection of the laws."

The Anti-Terrorism and Effective Death Penalty Act, as codified in 28 U.S.C. Section 2254(d), provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(e)(1) of Title 28 provides that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

STATEMENT OF THE CASE

I. The murder.

Only a few facts about Ricky Adkins' crime are relevant here. The evidence at trial established that Adkins was a white male in his early 20s, traveling from city to city in a stolen car. *See generally Adkins v. State*, 600 So. 2d 1054, 1056 (Ala. Crim. App. 1990). He would visit "open houses" and pretend to be interested in purchasing real estate. *Id.* On the morning of January 17, 1988, Adkins was seen with Billie Dean Hamilton, a white married female real-estate agent in Birmingham, Alabama. *Id.* at 1058. She was later found dead—partially-clothed, stabbed, choked, and bludgeoned—on the side of the road. *Id.* at 1058-59. There was also evidence of rape. *Id.* at 1059.

Adkins was captured in Georgia with Mrs. Hamilton's credit card. *Id.* He immediately confessed to her murder. *Id.* He later testified at trial that, although he murdered Mrs. Hamilton, he did not

kidnap, rob, or rape her. *Id.* These acts would make his crime a capital offense. Instead, he testified that he approached her to show him real estate and she willingly accompanied him to a deserted exit off the interstate and voluntarily had sex with him there. *Id.* He then, purportedly, killed her during an argument. *Id.* The jury did not believe Akins' story and convicted him of three counts of capital murder—murder during a rape, a robbery, and a kidnapping. The jury recommended a sentence of death, and the judge agreed. App. 3a.

II. Adkins raises a *Batson* claim, which the state courts consider and reject.

Both Adkins and his victim were white, and Adkins was tried by a jury of 13 whites and 1 black. Adkins did not object to the racial composition of his jury at trial or on appeal to the state intermediate appellate court. Instead, he first raised an objection on a petition for writ of certiorari to the Alabama Supreme Court. *See Ex parte Adkins*, 600 So. 2d 1067 (Ala. 1992).

Based on Alabama Rule of Appellate Procedure 45A, which requires the state appellate courts to correct any "plain error" in capital cases even if "not brought to the attention of the trial court," the Alabama Supreme Court allowed Adkins to raise an untimely *Batson* claim. *Adkins*, 600 So. 2d at 1068-69. In Alabama, the prosecution and defense must quickly use all their peremptory strikes (24 strikes for each side in this case) in an alternating manner to winnow the pool of jurors down to the number needed for trial. The state supreme court noted that,

"[d]uring jury selection, the State exercised 9 of its 24 peremptory strikes to remove 9 of 11 blacks from the jury[,] Adkins's lawyers struck one of the two remaining black jurors, and one black served on the jury." *Id.* at 1069. The court remanded for a hearing on whether the prosecutor struck any black juror on the basis of race. *Id.*

A. The evidentiary hearing.

On limited remand from the state appellate courts, the trial judge held a hearing on the prosecutor's reasons for striking certain black jurors from the venire. *Batson* establishes a three-step test to determine whether a prosecutor struck a juror because of his or her race. The first step of *Batson* requires the court to evaluate whether there is a *prima facie* case of discrimination. The second step of *Batson* requires the prosecutor to state her reasons for striking a particular juror. And the third step of *Batson* requires the court to decide whether the prosecutor has told the truth about the reasons for her strikes. *See generally Rice v. Collins*, 546 U.S. 333, 338 (2006).

The *Batson* hearing here occurred four years after trial. Doc. 28, Tab 27.[1] The lead prosecutor who struck the jury complained about his inability to remember the reasons for the strikes in light of the passage of time. *Id.* at 18, 25. And a second prosecutor testified that he did not have any of his notes from the jury strikes because his office had

[1] These are citations to the state-court record as filed in the district court.

been remodeled and his files "ha[d] been moved around many times." *Id.* at 26.

The prosecutors turned over their available notes to the defense. The notes of one of the assistant prosecutors identified the races of the jurors. *Id.* at 21. The defense attorneys cross-examined the lead prosecutor, who struck the jury, under oath. *Id.* at 7, 17.

The lead prosecutor explained that his plan had been to strike all unmarried persons from the jury. App. 120a. He said that the only unmarried juror that served on the jury was a black juror, who had previously served on one of the district attorney's grand juries. Doc. 28, Tab 27 at 14-15. The lead prosecutor reconstructed from his notes and memory the following reasons for using 9 of his 24 strikes against black jurors:

- Fifth Strike asked to be excused from jury because he had ulcers and was 61 years old;
- Sixth Strike (Billy Morris) was single;
- Eighth Strike worked at a restaurant that was being investigated for illegal activities and the prosecutor had prosecuted her husband;
- Ninth Strike was single, young, and seemed inattentive and disinterested;
- Eleventh Strike was single, asked to be excused because of high blood pressure, and was unemployed;
- Twelfth Strike was single and was associate of former chief of police who had been forced to resign;
- Fourteenth Strike was 86 years old, could not hear, and knew defense counsel;

- Seventeenth Strike was single and had adversarial dealings with district attorney's office in her job for state agency;
- Eighteenth Strike had father who was convicted of federal drug crime and husband's family was involved in criminal activities.

App. 5a-6a, 79a-80a, 95a-97a, 129a-149a; Doc. 28, Tab 27.

After the evidentiary hearing, the trial judge reviewed the record of the voir dire and discovered that juror Billy Morris, the prosecutor's sixth strike, was married. App. 110a. The judge entered an order that instructed the prosecutor to explain his assertion that Mr. Morris was struck because he was unmarried. App. 110a. The prosecutor filed an affidavit:

> [The other lead prosecutor] and myself were at all times under the impression and understood that Mr. Billy Morris was a single male and he was struck by the state for that reason. . . . The notes which we prepared in preparation for the *Batson* Hearing also reflected that Billy Morris was single and nowhere in our notes taken during this jury selection process is it noted that Billy Morris was a married man.

App. 111a. The prosecutor's affidavit was apparently not served on defense counsel in a timely manner. App. 26a n.9.

The trial judge denied the *Batson* claim in a written order. App. 95a-100a. The trial judge noted

that Adkins' "primary defense" was that he did not rape or kidnap the victim because "he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him." App. 97a. It thus made sense to the trial judge that the prosecutor would consider "jurors who were married" as "preferable to single jurors." App. 97a. The trial judge noted that, with the exception of the black juror who served on the jury, the prosecutor removed all the single jurors. App. 98a. The trial judge noted that Mr. Morris was not actually single. But "view[ing] that issue from the context of the entire proceedings," the trial judge found the prosecutor's "statement as to mistaken belief as to the marital status of juror Morris to be credible." App. 99a. The trial judge expressly "f[ound] that there was no purposeful racial discrimination in the peremptory strikes exercised by the State." App. 100a.

B. The court of criminal appeals' decision.

The Alabama Court of Criminal Appeals affirmed. App. 78a-94a. The court stated, "[a]fter a careful review of the reasons given by the prosecutor and after examining the testimony taken at the *Batson* hearing, we find that no *Batson* violation occurred here." App. 80a. The court noted that the particular district attorney's office at issue "does not have a history of discriminatory striking." App. 81a. The court quoted from the trial court's order and summarized the prosecutor's stated reasons for striking the various jurors. App. 81a-86a. The court concluded: "This court will not reverse a trial court's

decision on a *Batson* violation unless that decision is 'clearly erroneous' . . . We do not find the trial court's decision here clearly erroneous." App. 86a-878a (citation omitted).

Judge Bowen dissented. App. 87a. He would have found a *Batson* violation with respect to the strike of Mr. Morris. App. 90a.

III. The district court denies Adkins' habeas petition applying a deferential standard of review.

After Adkins exhausted state post-conviction relief on other issues, he filed a federal habeas petition on the *Batson* issue, among others.

The magistrate judge exhaustively detailed the reasons to deny the *Batson* claim. App. 103a-153a. As to Mr. Morris specifically, the magistrate judge noted that "it was for the [state] court to determine whether the prosecutor struck Morris because he believed him to be single." App. 132a. The magistrate judge explained that, "[w]hen given an opportunity to supplement the record, the prosecutor did not make an alternative argument but rather acknowledged that he was mistaken about Morris' marital status when he struck him." App. 131a. The magistrate judge also noted that "Adkins did not question the prosecutor about this error at the evidentiary hearing despite the fact that the trial transcript [in which Morris states he is married] was certified and filed on June 12, 1989," several years before the hearing. App. 131a. The mere fact that a "prosecutor's reason for striking a juror . . . is based on a belief that is ultimately proved incorrect does

not establish by clear and convincing evidence that the state court's finding of fact was erroneous." App. 132a.

The district court agreed with the magistrate judge. The district court expressly rejected Adkins' contention that de novo review applied and stressed instead the deferential standard of review under AEDPA. App. 64a-65a. The district court explained that "[a]lthough 'reasonable minds reviewing the record might disagree about the prosecutor's credibility,' this court may not grant relief unless it determines 'that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude [Adkins] had shown a *Batson* violation.'" App. 66a (quoting *Rice v. Collins*, 546 U.S. 333, 341-42 (2006)). The district court noted the trial court's express finding of credibility and the appellate court's finding that the district attorney's office had no history of discrimination. "Although the evidence does not compel a finding that the prosecutor exercised his peremptory strikes without any racial motivation and reasonable minds might differ," the district court concluded that "the evidence in the record is legally sufficient to support the trial court's finding of no *Batson* violation." App. 68a.

IV. The court of appeals grants the habeas petition, applying de novo review.

The Eleventh Circuit Court of Appeals, per Judges Martin and Barkett, reversed the district court and granted Adkins' habeas petition on the

grounds that Mr. Morris was struck because of his race.

First, the court held that the state appellate court "unreasonably applied" federal law because its written opinion did not "consider all the relevant circumstances bearing on whether Mr. Adkins established purposeful discrimination." App. 22a. The court explained that the "entire discussion of the state's decision to strike Mr. Morris was limited to two sentences," in which the state court summarily concluded that "'[w]e do not find the trial court's decision here clearly erroneous.'" App. 23a. The court of appeals criticized the state court because "[t]here is no indication from its opinion that the Alabama Court of Criminal Appeals considered any of the relevant circumstances bearing on the ultimate issue of discriminatory purpose beyond the fact that the prosecutor had proffered race-neutral reasons for its strikes." App. 23a. The court of appeals then listed the facts that the state court's opinion "did not even mention," including the fact that the prosecutor's affidavit was not served on defense counsel in a timely manner. App. 24a. Because the state court "did not even mention all the relevant circumstances brought to its attention by Mr. Adkins in his brief," App. 23a, the court of appeals set its judgment aside. The court of appeals then held that the state trial court had "unreasonabl[y] determin[ed]" the facts for the same reasons. App. 28a-29a. Accordingly, the court of appeals set aside the state trial court's fact-finding as well.

Second, the court of appeals reviewed the record de novo and found that Mr. Morris was struck because of his race. App. 29a-37a. The court of

appeals' de novo review effectively adopted the dissenting opinion from the state appellate court. *Compare* App. 29a-36a *with* App. 87a-94a. The court "stress[ed] the strength of Mr. Adkins's prima facie case for discrimination." App. 30a. The court also stressed the fact that Mr. Morris was not single, as the prosecutor had stated. App. 31a. Finally, the court of appeals relied on the fact that an assistant prosecutor had noted the races of the jurors and that the prosecutor's reasons for striking some of the other black jurors were suspect. App. 32a-36a. The court of appeals did not expressly consider other facts, such as the fact that there was no racial element to the case, that the district attorney's office was found to have no history of racial discrimination, or the fact that a black juror served on the jury.

Judge Tjoflat dissented. App. 38a-58a. Judge Tjoflat explained that the majority was improperly "fault[ing] the Court of Criminal Appeals' decision because the Court of Criminal Appeals 'did not give any consideration at Batson's third step to several relevant circumstances raised by Adkins in his brief.'" App. 44a. Judge Tjoflat would have held instead that, because a *Batson* claim cannot be raised for the first time on appeal, federal law has nothing to say about the state courts' decision to deny such an untimely claim on the merits.

Petitioners filed an application for rehearing and rehearing en banc, which the court of appeals denied. App. 101a-102a.

REASONS FOR GRANTING THE WRIT

The Eleventh and Ninth Circuits are on the wrong side of a circuit split about how summary and abbreviated state-court opinions must be treated under AEDPA. The Court held in *Harrington* and *Johnson* that even summary and abbreviated opinions qualify as "on the merits," and, as such, are subject to AEDPA deference. But the Court has not addressed the question in this case: whether abbreviated on-the-merits decisions are nonetheless rendered per se "unreasonable" merely because the opinions are abbreviated.

Regardless, it follows from *Harrington* and *Johnson* that the Eleventh Circuit got this case wrong. There would be little use in drawing abbreviated rulings within the ambit of AEDPA under *Harrington* and *Johnson* if, by virtue of their very abbreviated nature, they were to be deemed "unreasonable" and afforded no deference. Just as the holding in *Johnson* "follow[ed] logically from [the] decision in *Harrington*," so too does this conclusion follow logically from both. 133 S. Ct. at 1089.

Only the Eleventh and Ninth Circuits have adopted a rule that allows them to review a state court's conclusion de novo merely because its opinion is "limited to two sentences." App. 23a. The First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have adopted a contrary rule, and five of those circuits have applied their contrary rule to *Batson* claims specifically. As explained in more detail below, the lower court's rule is wrong, and its application had an especially meaningful impact in

this case. The Court should grant the writ and overturn the lower court's decision.

I. The lower courts are split on the question presented.

A. The Ninth and the Eleventh Circuits dispense with AEDPA deference because of the state court's abbreviated written opinion.

Both the Eleventh and Ninth Circuits treat state court decisions that deny constitutional claims "on the merits" as *per se* "unreasonable" if those written decisions fail to expressly mention key evidence. This frees these circuits to review abbreviated or summary state-court decisions de novo.

1. *Eleventh Circuit*. In the instant case, the Eleventh Circuit held that the state court's finding that the prosecutor did not strike a juror because of his race was *per se* unreasonable because the state court's written opinion did not recount all the "relevant" evidence that it was supposed to consider. App. 23a. The Eleventh Circuit noted that the state court's "entire discussion of the [prosecutor's] decision to strike" the challenged juror "was limited to two sentences." App. 23a. The Eleventh Circuit faulted the state court because there was "no indication from its opinion that [the state court] considered any of the relevant circumstances." App. 23a. "Because the Alabama Court did not even mention all the relevant circumstances brought to its attention by Mr. Adkins in his brief," the Eleventh

Circuit held the state court's decision to be an "unreasonable application of federal law. " as well as an "unreasonabl[e] determin[ation of] the facts." App. 29a. *See also* App. 27a (the state court "did not mention or consider" certain facts); 28a (the state court "never mentioned" certain facts); 29a (the state court "overlooked material facts"). The Eleventh Circuit then proceeded to review the issue de novo, and concluded that there had been a *Batson* violation. App. 29a-37a.

The Eleventh Circuit's decision in this case follows a deeply rooted strain of the circuit's precedent. *See McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252 (11th Cir. 2009); *Lee v. Thomas*, 2012 WL 1965608, at *2 (S.D. Ala. May 30, 2012); *Stephens v. Haley*, 823 F. Supp. 2d 1254, 1275 (S.D. Ala. 2011).

2. *Ninth Circuit*. The Ninth Circuit is the only circuit to have adopted the Eleventh Circuit's approach. In *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), the Ninth Circuit held that a "state courts' failure to consider, or even acknowledge" certain "highly probative testimony casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decisions were based on an unreasonable determination of the facts." *Id.* at 1005. Turning to the written opinion in that case, the Ninth Circuit noted that the state court "said nothing at all," "failed to mention," and "utterly fail[ed] to discuss the significance" of certain testimony. *Id.* at 1005-07. Because the state court's written opinion failed to expressly take the "testimony into account," the Ninth Circuit deemed its decision unreasonable. *Id.* at 1008. The Ninth

Circuit then "set [the state court's] findings aside and . . . ma[d]e new findings" based on its de novo review of the record. *Id.*

The Ninth Circuit applied this erroneous standard to a *Batson* claim in *Brown v. Papa*, 317 Fed. App'x. 589 (9th Cir. 2006)(unpublished). There, the Ninth Circuit censured the state court for not "citing to any material from the voluminous voir dire" in the state court's written opinion. *Id.* at 593. State "appellate courts have no excuse for failing to examine and discuss voir dire transcripts," the Ninth Circuit held. *Id.* at 594. On that basis, the court found the state court's disposition unreasonable. *Id.* The Ninth Circuit then ruled that "[b]ecause the state court's determination of facts was unreasonable, we must set aside its erroneous findings and determine whether," on "our own review of the record," the defendant "has satisfied his burden." *Id.* at 593.

B. The First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits treat abbreviated written opinions in a contrary manner.

The majority of federal courts have held that a state court's disposition of a constitutional claim on the merits is not subject to de novo review merely because the state court's written opinion does not expressly consider all the evidence. The Second, Fifth, Sixth, Eighth, and Tenth Circuits have applied this rule to *Batson* claims specifically.

1. *First Circuit*. In *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009), the First Circuit rejected

the argument that a state-court decision was unreasonable for "the paucity of reasoning" in the accompanying opinion. *Id.* at 429. It held that "the ultimate inquiry is not the degree to which the state court's decision is or is not smoothly reasoned; the ultimate inquiry is whether the outcome is reasonable." *Id.* Contrary to the Eleventh and Ninth Circuits, the court held that "[a]lthough the Appeals Court's reasoning on this issue seems perfunctory (a single paragraph with scant analysis), the outcome reached by the court appears to be both plausible and adequately supported." *Id. Accord Brown v. Ruane*, 630 F.3d 62, 72 (1st Cir. 2011) ("In evaluating a state court's application of federal law, our inquiry is not how well reasoned the state court decision is, but whether the outcome is reasonable." (internal quotation marks omitted)); *Clements v. Clarke*, 592 F.3d 45, 55-56 (1st Cir. 2010)("[I]t is the result to which we owe deference, not the opinion expounding it." (emphasis added)); *Rashad v. Walsh*, 300 F.3d 27, 45 (1st Cir. 2002) (in reviewing a state-court opinion that was "not very comprehensive" and "did not discuss explicitly" material portions of the record, the court held it to be reasonable because "[i]t is not our function . . . to grade a state court opinion as if it were a law school examination").

2. *Second Circuit.* The Second Circuit has similarly held that "deficient reasoning will not preclude AEDPA deference." *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001). After all, the court explained, "we are determining the reasonableness of the state courts' 'decision,' 28 U.S.C. § 2254(d)(1), not grading their papers." *Id.* The Second Circuit aligned with

"several circuits" that have "noted that, in making the 'reasonable application' determination, they would look to the result of a state court's consideration." *Id. Accord Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001).

The Second Circuit has applied this approach to *Batson* claims. In *Messiah v. Duncan*, 435 F.3d 186 (2d Cir. 2006), the court confronted a trial-court determination made without explicit fact-finding, and an appellate opinion that "disposed of [the] *Batson* claims with the following concluding sentence: 'The defendant's remaining contentions, including those raised in his supplemental pro se brief, are either unpreserved for appellate review…or without merit." *Id.* at 193 (internal citations omitted). The court proceeded to consider only whether the *ultimate conclusion* reached was "supported by the record," finding that it was under the deferential standard of review of § 2254(d). *Id.* at 201-02. Similarly, in *McKinney v. Artuz*, the Second Circuit made clear that "[a]lthough reviewing courts might have preferred the trial court to provide express reasons for each credibility determination," in its *Batson* decision, "no clearly established federal law required the trial court to do so." 326 F.3d 87, 100 (2d Cir. 2003). *See also Isaac v. Brown*, 205 Fed. App'x. 873 (2d Cir. 2003) (deferring to conclusion of *Batson* claim resolved by summary order).

3. *Fourth Circuit.* In *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), the Fourth Circuit was "unable to ascertain the state court's rationale from the relatively summary nature of its disposition of th[e] claim." *Id.* at 677. Nevertheless, the Fourth Circuit

ruled, "[w]hen the state court decision being reviewed by a federal habeas court fails to provide any rationale for its decision, we still apply the deferential standard of review mandated by Congress to determine whether the decision ultimately reached by the state court was" unreasonable under § 2254(d). *Id.* In *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), a panel decision had employed the Eleventh Circuit's approach, holding that "because the state court decision fails to articulate any rationale for its adverse determination of Cardwell's claim, we cannot review that court's" resolution under traditional AEDPA deference. *Id.* at 339. The Fourth Circuit expressly overruled *Cardwell* in *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000) (en banc). Even in the absence of an articulated rationale, the Fourth Circuit resolved to "uphold the state court's summary decision unless [an] independent review of the record" reveals that "the state court's *result* is legally or factually unreasonable." *Id.* at 163. *Accord Wolfe v. Johnson*, 565 F.3d 140, 162 (4th Cir. 2009).

4. *Fifth Circuit.* In *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002), the Fifth Circuit acknowledged the split over whether "a federal habeas court looks exclusively to the objective reasonableness of the state court's *ultimate conclusion* or must also consider the *method* by which the state court arrives at [that] conclusion." *Id.* at 244 (emphasis added). Such a question is important where a state court's conclusion is reasonable, but its written opinion fails to expressly "evaluate and weigh the substantial evidence." *Id.* at 245. The Fifth Circuit then ruled

that "a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision." *Id.* at 246. The "focus," the court continued, "should be on the ultimate legal *conclusion* that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Id.* (emphasis added). Subsequent opinions have reinforced the Fifth Circuit's position. *See Davis v. Thaler*, No. 11–20606, 2013 WL 586778, at *6, n. 4 (5th Cir. Feb. 6, 2013) ("[t]he path the state court takes to reach its decision is immaterial" under AEDPA.); *Austin v. Cain*, 660 F.3d 880, 893 (5th Cir. 2011) ("The only question for a federal habeas court is whether the state court's determination is objectively unreasonable."); *Jasper v. Thaler*, 466 Fed. App'x 429, 435 (5th Cir. 2012) ("a federal court reviews only the state court's ultimate decision – not every link in the state court's reasoning"); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) ("under the deferential standard of AEDPA, we review only the state court's decision, not its reasoning or written opinion"); *DiLacosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002) ("the subject of [AEDPA's] inquiry [is] on the state court's ultimate conclusion, not on its reasoning process").

The Fifth Circuit has applied this rule to *Batson* claims. In *Fields v. Thaler*, 588 F.3d 270 (5th Cir. 2009), it was "difficult to tell whether the Texas court" compared white jurors with black jurors who were struck, which is one of the circumstances that courts must consider in evaluating a *Batson* claim. *Id.* at 276. But the Fifth Circuit nonetheless held that "we need not resolve that" issue "because even if

we assume that the Texas court did not perform a comparative analysis or that it did and that its analysis was inadequate under" Supreme Court precedent, the state court's *ultimate conclusion* was nevertheless reasonable. *Id.* at 276-77. Similarly, in *Brawner v. Elps*, 439 Fed. App'x 396 (5th Cir. 2011) (per curiam), the court denied a certificate of appealability despite the fact that state court's opinion expressly did not "'review each gender neutral reason offered by the State for its strikes,' including the reasons given for the [challenged] juror." *Id.* at 409. Even if the state court failed to conduct the analysis, the Fifth Circuit ruled that the final conclusion reached by the state court was not unreasonable, and thus no certificate would issue. *Id.* at 410.

5. *Sixth Circuit.* The Sixth Circuit too has adopted an approach at odds with the Eleventh and Ninth. In *Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000), the court confronted the question of "how to apply § 2254(d) when there is no state court decision articulating its reasons." *Id.* at 943. It noted that "[o]ther circuit courts have concluded that . . . federal courts are obligated to conduct an independent review of the record . . . to determine whether the state court decision" is unreasonable under § 2254(d). *Id.* It went on to emphasize, much like its peer courts, that the independent review "is not a full, de novo review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.* Habeas review is meant to "focus on the *result* of the state court's

decision," even when the state court's written opinion is "by form order or without extended discussion." *Id.* at 943 n.1 (emphasis added); *see also Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009) ("The law requires such deference to be given even in cases, such as this one, where the state court's reasoning is flawed or abbreviated.")

The Sixth Circuit has applied this rule to *Batson* claims. In *Braxton v. Gansheimer*, 561 F.3d 453 (6th Cir. 2009), the Sixth Circuit grappled with a state-court decision that had "gloss[ed] over" important aspects of the analysis. *Id.* at 462. The state court's articulated *Batson* explanation was heavily "abbreviated," yet the court denied habeas relief nonetheless. *Id.* "In the absence of clearly established Supreme Court authority requiring further elaboration" in written opinions, *id.*, ruled the court, habeas review would end where "the record show[ed]" that "the trial court's factual determination was not unreasonable." *Id.* at 464 (internal citation omitted). Similarly, in *Akins v. Easterling*, 648 F.3d 380 (6th Cir. 2011), the court "question[ed] the state court's reasoning," and described in detail the reasons it found the state court's written opinion troubling. *Id.* at 393. Nevertheless, the court could not "conclude that the state court's determination" itself qualified as "objectively unreasonable." *Id.* at 394.

6. *Eighth Circuit.* The Eighth Circuit held in *Williams v. Roper*, 695 F.3d 825 (8th Cir. 2012), that "in reviewing whether the state court's decision involved an unreasonable application of clearly established federal law," it is "the ultimate legal

conclusion reached by the court not merely the statement of reasons explaining the state court's decision" that is material. *Id.* at 831 (internal citation omitted). Rejecting the dissent's suggested method – which was in line with the Eleventh Circuit's – the court held that a de novo review would constitute too "narrow" a "vision of deference under the AEDPA." *Id.* at 833. "[T]here often is more than one way to resolve an appeal, and not every possible approach makes it into an opinion." *Id.* at 837.

The Eighth Circuit has applied this rule to *Batson* determinations. In *Edwards v. Roper*, 688 F.3d 449 (8th Cir. 2012), it held that a state court had "not unreasonably appl[ied] clearly established federal law by failing to mention specifically" material facts in its *Batson* ruling. *Id.* at 459. Indeed, far from requiring a fully-articulated explanation, the court held that a state court need not offer any explanation at all. *Id.* Likewise, in *Smulls v. Roper*, 535 F.3d 853 (8th Cir. 2008), the court held that "the denial of a *Batson* challenge is itself a finding at the third step that the defendant failed to carry his burden of establishing that the strike was motivated by purposeful discrimination." *Id.* at 863. The court went on to reject the dissent's suggestion that the court deem the state court's finding unreasonable merely for the failure to articulate its reasoning. *Id.* at 861-62.

7. *Tenth Circuit.* The Tenth Circuit's jurisprudence also contradicts the Eleventh's. In *Aycox v. Lytle*, 196 F.3d 1174 (10th Cir. 1999), the Tenth Circuit "consider[ed] what it means to defer to a decision which does not articulate" its reasoning.

Id. at 1177. The court mentioned that "[o]ther circuits which have considered the issue look to the state court's *result* and defer to it even where analysis is lacking." *Id.* (emphasis added). The court then held that, as the "focus is on the state court's *decision* or *resolution* of the case," under AEDPA, "a state court's *result*" warrants deference, "even if its reasoning is not expressly stated." *Id.* The Tenth Circuit explained that it would not conduct a "full de novo review of the petitioner's claims." *Id.* at 1178. Instead, it would evaluate whether "the state court's *result* is legally or factually unreasonable." *Id.* (emphasis added); *see also Gipson v. Jordan*, 376 F.3d 1193, 1197 (10th Cir. 2004) ("we defer to the [state court's] decision unless we conclude that its result – not its rationale – is" unreasonable).

The Tenth Circuit has applied this approach in *Batson* cases as well, expressly joining its sister circuits. In *Saiz v. Ortiz*, 392 F.3d 1166 (10th Cir. 2004), it held that, specifically in the *Batson* context, "when applying [AEDPA's] deferential standards in cases involving a state-court summary disposition, we focus on the result of the state court decision, not its reasoning." *Id.* at 1176. It went on to cite several of the circuit cases listed above. It then discounted the importance of the written reasoning of the state-court decision it was reviewing, holding that while explicit and articulated "rulings are preferable," even "implicit findings" must still be "rebutted by clear and convincing evidence." *Id.* at 1180.

II. The Eleventh Circuit's decision conflicts with this Court's precedents.

The lower court's decision is in conflict with this Court's precedents. This Court has held that, even when a state-court decision is accompanied by a brief written opinion, or no opinion at all, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S. Ct. at 784; *see also* 28 U.S.C. § 2254(e)(1). In declaring the state court's written opinion "unreasonable" under § 2254(d), and thus subjecting its ultimate conclusion to de novo rather than deferential review, the Eleventh Circuit circumvented the "purpose and mandate of AEDPA" as well as "the now well-settled meaning and function of habeas corpus in the federal system." *Harrington*, 131 S. Ct. at 787.

A. The ultimate conclusion of a state court, not the opinion's language, is subject to AEDPA deference.

This Court has instructed federal courts applying AEDPA to identify the state court's conclusion, and then ask whether a jurist "reasonably *could* have determined" or "reasonably *could* have concluded" that such a result would be warranted. *Premo v. Moore*, 131 S. Ct. 733, 744, 745 (2011) (emphasis added). Indeed, a state court's written opinion need not correctly cite, or even mention, this Court's precedent, so long as its conclusion remains inoffensive to this Court's doctrine. *See Early v. Packer*, 537 U.S. 3, 8 (2002). The Court has refused to "impose on state courts the responsibility for using

particular language" in reaching their decisions. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). So long as the state court's conclusion itself was reasonable, "[u]nder AEDPA, that finding ends federal review." *Premo*, 131 S. Ct. at 745.

It is true, of course, that when "the requirement" of unreasonableness "set forth in [2254] is satisfied[, a] federal court must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). But a state court's decision cannot be deemed "unreasonable" merely because its written opinion fails to mention relevant evidence.

This Court has confirmed as much, most notably in the recent cases of *Harrington* and *Johnson*. As the Court observed, "[t]here is no text in the [AEDPA] requiring a statement of reasons" before a habeas court must defer to a state-court decision. *Harrington*, 131 S. Ct. at 784. Instead, the law "refers only to a 'decision,' which resulted from an 'adjudication.'" *Id.* Indeed, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning" at all. *Id.* In the words of the Fifth Circuit, the focus of a federal court's review must be "on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal*, 286 F.3d at 246.

If the Eleventh and Ninth Circuits are right about AEDPA, then *Harrington* and *Johnson* have no operation. Every summary or abbreviated decision that *Harrington* and *Johnson* bring into

AEDPA's ambit will nonetheless be subjected to de novo review, because the summary or abbreviated nature of the opinion itself will make it "unreasonable." This includes the summary affirmance that his Court addressed in *Harrington* and the partially-written opinion that the Court addressed in *Johnson*. Under the lower court's rule, summary decisions, partially-explained decisions, and decisions with conclusory reasoning are all treated to de novo review. These decisions would all be unreasonable merely because they failed to "mention" relevant evidence.

B. There is nothing unique to *Batson* that requires a state court to list all the relevant evidence in order to be reasonable.

The Eleventh Circuit's approach is all the more concerning in this case because it was applied to a "step-three" credibility determination under *Batson v. Kentucky*. The third step of *Batson* is a "pure issue of fact." *Hernandez v. New York*, 500 U.S. 352, 364 (1991). Even on direct review, a trial court's determination is afforded "great deference" because it is the kind of conclusion that remains "peculiarly within a trial judge's province." *Wainright v. Witt*, 469 U.S. 412, 428 (1985). After all, the decision will call for "determinations of [a prosecutor's] credibility and demeanor," *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008), something difficult to glean from a cold record "subject to the usual risks of imprecision and distortion from the passage of time," *Miller-El v. Dretke*, 545 U.S. 231, 241 n.1 (2005) (hereinafter "*Miller-El II*") (internal quotations marks and

citation omitted). Furthermore, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elm*, 514 U.S. 765, 768 (1995). Indeed, when combined with AEDPA's already heightened standard of review,[2] the deference due a *Batson* step-three factual determination is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (addressing "double deference" for ineffective assistance claims).

This Court very frequently instructs lower courts to evaluate all the "relevant circumstances" when ruling on factual issues. *E.g. J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011) (whether person is "in custody"). And *Batson* is no different. This court has held, "in considering a *Batson* objection," that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder,* 552 U.S. at 478. But, just as in other contexts, nothing in *Batson* mandates that a state court explain or mention these circumstances in a published opinion in order to get deference under AEDPA.

The lower court invokes the *Miller-El* line of cases to justify its approach, but these decisions actually contravene it. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (hereinafter "*Miller-El I*"), which concerned the granting of a certificate of appealability, this

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[2] For purposes of 2254 habeas review, factual determinations of an appellate court are entitled to the same level of deference as trial court rulings. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981) ("[§ 2254(d)] makes no distinction between the factual determinations of a state trial court and those of a state appellate court.").

Court stressed that "a state court need not make detailed findings addressing all the evidence before it." *Id.* at 347. For its part, *Miller-El II* arrived at this Court "on review of a denial of habeas relief sought under 28 U.S.C. §2254, following [a state court's] prior determination of fact that the State's race-neutral explanations" were credible. 545 U.S. at 32. Unlike the Eleventh Circuit in this case, this Court did not review the state court's ultimate factual determination de novo. Relief was granted in *Miller-El II* only because the step-three factual conclusion itself was "shown up as wrong to a clear and convincing degree" and was "unreasonable as well as erroneous." *Miller-El II*, 545 U.S. at 266 (emphasis added). Although the Court criticized the *federal* appellate court for "failing to note" and "mention" certain facts, it did not discuss or evaluate the written opinion of the *state* court in evaluating the reasonableness of the state court's decision. *Id.* at 246.

The Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), also emphasized that a factual determination in a *Batson* case is not to be overturned without a finding that the state court's conclusion itself was unreasonable. In *Rice*, the Ninth Circuit had reviewed a state-court decision and "found no error in the trial court's proceedings or rulings in the first two steps of the Batson inquiry." *Id.* at 339. As here, "it disagreed, however, with the trial court's conclusions on the third step." *Id.* This Court reversed, making clear that factual determinations themselves are reviewed deferentially, not de novo. "Reasonable minds reviewing the record might disagree about the

prosecutor's credibility," held the Court, "but on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.* at 341-42. Rather than focusing on the state-court's reasoning, the Court held simply that "the trial court's credibility determination" – the result – "was not unreasonable" in light of the evidence in the record. *Id.* at 339.

III. This issue is important.

The Eleventh Circuit's rule will apply equally to summary opinions, per curiam affirmances, and other kinds of truncated or abbreviated opinions. It will thus have immediate and practical consequences. Because the "caseloads shouldered by many state appellate courts are very heavy," *Johnson*, 133 S. Ct. at 1095, and because a state's own collateral-review process can take many years, there are hundreds of final state-court criminal judgments in the queue for federal habeas in the affected circuits that are accompanied by opinions with partial, summary, or abbreviated reasoning. All of these past decisions are open to potential de novo review in federal court.

Moreover, just as in *Harrington* and *Johnson*, the rule adopted by the lower court undermines the very point of AEDPA, which was to "prevent[] defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010). For that reason, the standard of review is "the only question that matters" in habeas jurisprudence. *Lockyer v.*

Andrade, 538 U.S. 63, 71 (2003); *see also Williams v. Taylor*, 529 U.S. 362, 410 (2000) (opinion of the court). Accordingly, it is well worth this Court's resources to make sure that lower courts are not erroneously reviewing state-court decisions de novo.

IV. This case is a good vehicle.

This case is also a good vehicle. As the district court expressly held and the court of appeals implicitly recognized, the deferential standard of review is dispositive here. Certainly, a case can be made that the prosecutor's stated reasons for striking Mr. Morris were pretextual. The lower court has made it.

But a strong case can also be made that Adkins has not proved his claim. The trial court's decision turns on a credibility determination that it was uniquely suited to make. And it was amply supported by the record. The prosecutor said he struck Mr. Morris because he was single even though the prosecutor had two opportunities to come up with another reason: before the *Batson* hearing, when the transcript revealing Mr. Morris's marital status was available, and after the hearing, when the inconsistency was expressly identified by the trial judge. As the trial judge and lower courts noted, the prosecutor never changed or hedged his explanation. For his part, Adkins had a copy of the voir dire transcript that revealed Mr. Morris to be married and had the prosecutor on the witness stand (which is unusual for a *Batson* hearing), but Adkins did not cross-examine the prosecutor about any inconsistencies in his testimony. Only the state trial

judge's thorough review of the record brought the issue to light.

Moreover, the prosecutor's reasons are consistent with other aspects of the record. There was no racial element to this crime. Instead, this case was about the kidnapping, rape, and murder of a married white woman by a young white man. The prosecutor's explanations for his strikes make sense in this context; a middle-aged married juror would not be inclined to believe that a married woman freely had sex on a deserted road with a young drifter she just met at her real estate office. Furthermore, the prosecutor used only 9 of his 24 strikes against black jurors and the rest against white jurors. His failure to strike two of the black jurors, although he had the available strikes, is inconsistent with the notion that he was striking because of race.

Finally, the court of appeals' decision to apply a de novo standard is particularly jarring in this case. The only reason Adkins was allowed to raise his *Batson* claim for the first time in the state appellate courts is because the state appellate courts were reviewing his conviction for "plain error"—an incredibly high bar to meet. *See* p. 5, *supra*. A de novo standard is thus more generous to Adkins than the standard that the state courts themselves were applying. A de novo standard is also more generous to Adkins than the federal appellate courts would be if this jury had been struck in a federal district court. *E.g. United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992) ("[t]he failure to make a timely *Batson* objection results in a waiver of the claim").

* * *

The standard of review in AEDPA cases is the whole ball game, and that is especially true in this case. In the First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits, the state courts' conclusions in this case would not have been subjected to de novo review merely because their opinions were abbreviated. The Eleventh Circuit's decision deepens a split between the Circuits, and it is contrary to this Court's precedents. The conclusions of a state court are not unreasonable and subject to de novo review merely because they are not thoroughly explained in a written opinion.

CONCLUSION

The Court should grant certiorari and reverse or vacate the Eleventh Circuit's judgment.

Respectfully submitted,

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July 15, 2013

APPENDIX

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-12380

D.C. Docket No. 4:06-cv-04666-SLB

RICKY D. ADKINS,

Petitioner - Appellant,

versus

WARDEN, HOLMAN CF,
COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(February 27, 2013)

Before TJOFLAT, BARKETT and MARTIN, Circuit Judges.

MARTIN, Circuit Judge:

Petitioner Ricky Adkins, an Alabama prisoner on death row, appeals from the District Court's denial of his first petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. The District Court granted Mr. Adkins a Certificate of Appealability (COA) for the following issues: (1) whether the state unconstitutionally removed black jurors on the basis of their race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986); and (2) whether Mr. Adkins was denied his constitutional rights to fair proceedings and due process because of a judicial conflict of interest and the appearance of impropriety. This Court granted Mr. Adkins's request to expand the COA to include a third issue: whether his trial counsel rendered ineffective assistance of counsel during the penalty phase of his trial. Because we determine that Mr. Adkins Is entitled to habeas relief based on his Batson claim, we do not decide his other claims.

I. Background and Legal Presentation of the Claim

The body of Billie Dean Hamilton, a real estate agent who was Caucasian, was discovered in St. Clair County, Alabama, on January 18, 1988. See Adkins v. State, 600 So. 2d 1054, 1057, 1059, 1060–61 (Ala. Crim. App. 1990) (Adkins I); Ex parte Adkins, 600 So. 2d 1067, 1069 (Ala. 1992) (Adkins II). Right away, Mr. Adkins, also white, was arrested and charged with capital murder for Hamilton's death. Id.

Jury selection began on October 24, 1988. During that process, the state exercised nine of its twenty-four peremptory strikes to remove nine of eleven black veniremembers. Adkins II, 600 So. 2d at 1069. Mr. Adkins struck one of the two remaining black jurors, and ultimately, only one black juror served on the jury. Id. At the time of Mr. Adkins's trial, the rule in Alabama was that a white defendant, like Mr. Adkins, lacked standing to challenge the state's exercise of peremptory strikes to remove black jurors from the panel. See, e.g., Owen v. State, 586 So. 2d 958, 959 (Ala. Crim. App. 1990), rev'd sub. nom. Ex parte Owen, 586 So. 2d 963 (Ala. 1991). For this reason, there was neither an objection by the defense nor a proffer of reasons by the prosecutor for striking the nine black jurors.

The jury convicted Mr. Adkins of capital murder and sentenced him to death. See Adkins I, 600 So. 2d at 1056. On August 24, 1990, the Alabama Court of Criminal Appeals affirmed his convictions and sentence on direct appeal. Id. at 1067. Before Mr. Adkins sought review in the Alabama Supreme Court, see Adkins II, 600 So. 2d 1067, the United States Supreme Court delivered its ruling in Powers v. Ohio, holding "that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races." 499 U.S. 400, 402, 111 S. Ct. 1364, 1366 (1991). Following Powers, Mr. Adkins raised a Batson claim in his petition for writ of certiorari to the Alabama Supreme Court. Adkins II, 600 So. 2d

at 1069. The Alabama Supreme Court granted Mr. Adkins's petition and remanded his case to the Alabama Court of Criminal Appeals for further proceedings. Id. (citing Ex parte Bankhead, 585 So. 2d 112, 117 (Ala. 1991), aff'd on remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So. 2d 1146 (Ala. 1993)).[1] The Alabama Court of Criminal Appeals then remanded Mr. Adkins's case to the trial court for a Batson hearing on June 12, 1992, with the direction, "[d]ue return should be filed with this court within 90 days from the date of this opinion." Adkins v. State, 600 So. 2d 1072, 1073 (Ala. Crim. App. 1992) (Adkins III). The return was thus due on September 10, 1992.

The state trial court held the Batson hearing on July 29, 1992. During that hearing, the prosecutor proffered reasons for striking each of the nine black jurors, which the Alabama Court of Criminal Appeals summarized as follows:

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[1] In Ex parte Bankhead, the prosecutor peremptorily challenged eight of ten black jurors on the venire in a capital case with a white defendant. 585 So. 2d at 115, 117. Two blacks served on the jury. Id. at 117. After Powers was decided, the Alabama Supreme Court remanded Bankhead's case for a Batson hearing even though no objection was made at trial. Id. ("Based on Powers, we must now hold that Bankhead, a white, has standing under the Equal Protection Clause to challenge the prosecutor's allegedly racially motivated use of peremptory challenges.").

Prospective juror number 59 . . . was struck because he came forward and asked that he be excused from serving on the jury. He was 61 years old and had ulcers.

Prospective juror number 39 [Billy Morris] . . . was struck because he answered during the voir dire that he knew about the case and because he was also single.

Prospective juror number 8 . . . was struck because she stated that she knew about the case. The prosecutor also had information that she was married to or lived with an individual he had prosecuted.

Prospective juror number 52 . . . was struck because of his age and because he was single. He also appeared inattentive and seemed disinterested during voir dire.

Prospective juror number 36 . . . was struck because she was 53 and single. She was also unemployed and asked to be excused from serving on the jury because she had high blood pressure.

Prospective juror number 31 . . . was struck because she was single and because she was known to associate with a former local chief of police who had been forced to resign.

Prospective juror number 56 . . . was struck because he was 86 years old and

> because he indicated that he knew defense counsel.
>
> **Prospective juror number 14** . . . was struck because she was single and because she worked for the Department of Human Resources (DHR) and the district attorney's office had frequent dealings with her in her capacity as a DHR employee.
>
> **Prospective Juror number 60** . . . was struck because her father had a federal conviction for a drug-related crime.

Adkins v. State, 639 So. 2d 515, 517 (Ala. Crim. App. 1993) (Adkins IV), withdrawn, Ex parte Adkins, 662 So. 2d 925 (Ala. 1994) (unpublished table decision).[2] Also during the Batson hearing, the prosecutor's notes from the voir dire were admitted into evidence as exhibits.

On September 9, 1992, several weeks after the Batson hearing, the state trial court issued an order directing the prosecutor to supplement the Batson record by affidavit with an "explanation, if any, as to the District Attorney's contention that Billy Morris was a single man." The trial court's order noted that during voir dire Mr. Morris said he was married. In an affidavit submitted by the prosecutor dated the same day, the prosecutor stated:

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[2] Because our discussion of the Batson issue centers on juror Billy Morris, we identify him by name.

> Mike Campbell and myself were at all times under the impression and understood that Mr. Billy Morris was a single male and he was struck by the state for that reason. We did not learn until long after the trial and upon reading the transcript that Billy Morris was in fact married and his spouse unemployed. The notes which we prepared in preparation for the Batson [h]earing also reflected that Billy Morris was single and no where [sic] in our notes taken during this jury selection process is it noted that Billy Morris was a married man.

The next day, without argument or opportunity for cross-examination by Mr. Adkins about the prosecutor's affidavit, the state trial court entered its order finding "that there was no purposeful racial discrimination in the peremptory strikes exercised by the State as to Billy Morris, or any other black juror struck." The trial court's order expressly relied upon the testimony at the Batson hearing and the affidavit submitted by the prosecutor. With respect to Mr. Morris, the state trial court found that he was struck because of the "mistaken" belief that he was single. Invoking the trial court's own personal experience with the prosecutor in other cases,[3] the

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[3] In support of its finding that the prosecutor was credible, the state trial court's order stated:

> This Court having worked with District Attorney Davis on many other cases in the past, finds that he has never intentionally misrepresented any fact to this Court to

trial court found the prosecutor's assertion of mistaken belief as to Mr. Morris's marital status "to be credible." Upon the return from remand after the Batson hearing, the Alabama appellate courts again affirmed Mr. Adkins's convictions and death sentence. See Adkins IV, 639 So. 2d 515;[4] Ex parte Adkins, 639 So. 2d 522 (Ala. 1994) (Adkins V). The United States Supreme Court denied certiorari. Adkins v. Alabama, 513 U.S. 851, 115 S. Ct. 151 (1994).

Mr. Adkins timely sought postconviction relief in the state court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. His Rule 32 petition was denied by the state trial court, and the Alabama Court of Criminal Appeals affirmed. Adkins v. State, 930 So. 2d 524, 550 (Ala. Crim. App. 2001) (Adkins

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> gain an advantage in a criminal proceeding. He has many times admitted facts which were to the detriment of his cases and accepted the consequences of facts that were against his case. This Court has never found District Attorney Davis to purposefully exclude blacks from juries in cases prosecuted by him. The Court finds his statement as to mistaken belief as to the marital status of jury [sic] Morris to be credible.

[4] Judge Bowen dissented from the Alabama Court of Criminal Appeals opinion affirming the trial court's Batson decision. See Adkins IV, 629 So. 2d at 520–22 (Bowen, J., dissenting). According to Judge Bowen, "[i]t is obvious here that the district attorney engaged in disparate treatment of black veniremembers struck as opposed to white veniremembers possessing the same characteristics." Id. at 520. Judge Bowen dissented also because he believed "the trial court's finding of non-discrimination was clearly erroneous." Id. at 522.

VI). The Alabama Supreme Court denied discretionary review, and the Supreme Court denied certiorari. Adkins v. Alabama, 547 U.S. 1132, 126 S. Ct. 2022 (2006).

Mr. Adkins then timely filed the petition for writ of habeas corpus now before us, pursuant to 28 U.S.C. § 2254, in the District Court for the Northern District of Alabama on November 14, 2006. His petition asserted, among other claims, that the state unconstitutionally exercised its peremptory challenges by striking African-American jurors on the bases of their race in violation of Batson. In respondent's brief in the District Court, the state admitted that "[t]he merits of [Mr. Adkins's Batson] claim were reviewed and rejected by the Alabama Court of Criminal Appeals and the Alabama Supreme Court," but asserted that the state courts' denial of relief on this claim was entitled to deference under AEDPA. Ultimately, the District Court denied Mr. Adkins's Batson claim on the merits. Mr. Adkins filed a timely notice of appeal and as we recited above, the District Court granted him a COA on his Batson claim.

After oral argument before this Court, and long since the parties had submitted their briefs, we requested further briefing by the parties on the Batson issue. In that briefing, the state raised an argument for the first time that, because Mr. Adkins did not contemporaneously object to the prosecutor's peremptory strikes at the time of trial, he cannot raise a Batson claim in his federal habeas petition.

The state did not raise this argument in the District Court or in its original response brief filed in this Court. For this reason, we conclude that it has waived this argument. See United States v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001) (stating it is a "well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned"); United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) ("Parties must submit all issues on appeal in their initial briefs."); Id. (holding that "parties cannot properly raise new issues at supplemental briefing, even if the [new] issues arise based on the intervening decisions or new developments cited in the supplemental authority").

Although the dissent seems to suggest that Ardley is trumped by the policies implemented by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), our court has applied Ardley and Nealy to a number of cases, including § 2254 cases. See, e.g., Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1344 n.4 (11th Cir. 2005) (applying Nealy to § 2254 habeas case); Bond v. Moore, 309 F.3d 770, 774 n.5 (11th Cir. 2002) (applying Ardley to § 2254 habeas case); Isaacs v. Head, 300 F.3d 1232, 1253 n.6 (11th Cir. 2002) (same).

But even if we accept the dissent's premise, and assume that the state had not waived its arguments based upon Mr. Adkins's failure to contemporaneously object to the prosecutor's discriminatory exercise of peremptory challenges at

the time of trial, we would conclude that his federal claim is properly and squarely before us based on the state court record. Alabama law foreclosed Mr. Adkins, a white defendant, from bringing a Batson challenge at the time of his trial based on the state's peremptorily striking black jurors. See, e.g., Owen, 586 So. 2d at 959. Indeed, there can be no doubt that Powers was "clearly established federal law" within the meaning of 28 U.S.C. § 2254(d) at the time Mr. Adkins's case was pending on direct appeal before the Alabama Courts. See Greene v. Fisher, ___ U.S. ___, ___, 132 S. Ct. 38, 45 (2011) (holding that "clearly established Federal law," as determined by the Supreme Court for the purposes of § 2254(d), includes Supreme Court decisions in existence at the time of the state-court adjudication on the merits).

Neither can there be any doubt that state courts are free to fashion and enforce their own procedural rules to require that defendants make contemporaneous objections to preserve constitutional claims. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 86–87, 97 S. Ct. 2497, 2506 (1977) (applying procedural bar to habeas petitioner's constitutional claim because he did not contemporaneously object during the trial and, under state law, this failure barred state courts from hearing the claim on either direct appeal or state collateral review). "The appropriateness in general of looking to local rules for the law governing the timeliness of a constitutional claim is, of course, clear." Ford v. Georgia, 498 U.S. 411, 423, 111 S. Ct.

850, 857 (1991) (emphasis added). Ford confirms that Batson claims are no exception to the general rule:

> In Batson itself, for example, we imposed no new procedural rules and declined either "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," or to decide when an objection must be made to be timely. Instead, we recognized that local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases, and we left it to the trial courts, with their wide "variety of jury selection practices," to implement Batson in the first instance. Undoubtedly, then, a state court may adopt a general rule that a Batson claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected.

Id. (citations omitted). Thus, the Supreme Court in Ford viewed state court rules governing the timeliness of Batson claims to be procedural rules that "limit all review of the constitutional claim itself," so long as these rules are independent, adequate and firmly established. Ford does not call for us to treat the state rules as a prerequisite to, or element of, the constitutional claim. Id. at 423–24, 111 S. Ct. at 857–88. We do nothing new here. We have previously viewed a petitioner's failure to comply with a state's contemporaneous objection rule to preserve a Batson claim as a procedural

impediment, subject to traditional procedural default analysis, rather than as a defect in the constitutional claim. See, e.g., Pitts v. Cook, 923 F.2d 1568, 1571 (11th Cir. 1991) (finding petitioner procedurally defaulted Batson claim where he did not contemporaneously object at trial or on appeal as Alabama law required and could not show exception to procedural default rule); see also Tarver v. Hopper, 169 F.3d 710, 712–13 (11th Cir. 1999) (finding petitioner procedurally defaulted his Batson claim because he failed to contemporaneously object at trial where state court determined, under state rule, that claim was procedurally defaulted); Id. at 713 (stating, "Alabama can pick its own procedural rules and has done so here"); Cochran v. Herring, 43 F.3d 1404, 1409–10 (11th Cir. 1995) (concluding District Court properly addressed merits of Batson claim after finding that state courts "ha[d] not consistently applied a procedural bar" to cases like the petitioner's).

We certainly recognize that contemporaneous objection rules can serve important state interests, such as finality as well as giving a state trial judge the opportunity to immediately address, and if necessary correct, a constitutional injury.[5] For these

[5] We are certainly aware that a contemporaneous objection would, in many cases, allow the trial court to evaluate evanescent evidence relevant to Batson's third step, like the demeanor of the attorney exercising the peremptory challenge and the reasons offered by the attorneys relating to the demeanor of the jurors. See Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008). But the passage of time by

reasons, as well as important interests of comity and federalism, the procedural default doctrine does not permit federal habeas review of a claim rejected by a state court "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment," and a defendant cannot show cause and prejudice, or a miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 729, 750, 111 S. Ct. 2546, 2553, 2565 (1991).

But this is not one of those cases. No Alabama court has ever decided that Mr. Adkins's failure to object precluded it from considering the merits of his Batson challenge. Indeed, the record unambiguously shows just the opposite to be true. After Powers was decided, Mr. Adkins raised his Batson claim for the first time in his petition for writ of certiorari to the

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itself, where there is no procedural default, does not bar the presentation of a Batson challenge or evidentiary proceedings after the trial in support of the claim. See, e.g., Miller-El v. Cockrell, 537 U.S. 322, 328–29, 123 S. Ct. 1029, 1035 (2003) (Miller-El I) (noting that petitioner's Batson claim relied on pattern and practice evidence presented pretrial before Batson was decided, and, after his case was remanded by the Texas Court of Criminal Appeals for new findings based on Batson); Batson, 476 U.S. at 100, 106 S. Ct. at 1725 (remanding case to the trial court for proceedings to determine prosecutor's explanation, unstated at trial, for his removal of all black persons on the venire and whether facts establish purposeful discrimination); Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333, 1339 (11th Cir. 2012) (remanding petitioner's case to the District Court for further proceedings "to complete the final two steps of the Batson proceedings").

Alabama Supreme Court. The Alabama Supreme granted that petition for a writ of certiorari, according to its own procedural rules, and remanded the case to the trial court for a hearing on whether the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Batson. This, notwithstanding Mr. Atkins's failure to object at trial. Adkins II, 600 So. 2d at 1069, 1071. Following from that remand, the state courts considered and adjudicated Mr. Adkins's Batson claim on the merits. Under 28 U.S.C. § 2254(d), as amended by AEDPA, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington v. Richter, ___ U.S. ___, ___, 131 S. Ct. 770, 784–85 (2011); accord Childers v. Floyd, 642 F.3d 953, 967–70 (11th Cir. 2011) (en banc) (holding "an 'adjudication on the merits' [within the meaning of § 2254(d)] is best defined as any state court decision that does not rest solely on a state procedural bar"); see also Harris v. Reed, 489 U.S. 255, 264–65, 109 S. Ct. 1038, 1044–45 (1989) (presuming a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis). Applying these principles, there is simply no indication in any of the state courts' opinions which cause us to conclude that the Alabama courts adjudicated Mr. Adkins's federal claim on anything but the merits. The dissent may question the wisdom of whether the Alabama Supreme Court should have

excused Mr. Adkins's lack of a contemporaneous objection based on Alabama's own court rules, but the Alabama Court is entitled to implement its own wisdom on this. It is not for us to dictate to the state courts of Alabama which procedural rules it should adopt. Mr. Adkins's Batson claim is properly before this Court.

II. Standard of Review

Our review of Mr. Adkins's federal habeas petition is governed by 28 U.S.C. § 2254, as amended by AEDPA. Because Mr. Adkins's claim was adjudicated on the merits in his state court proceedings, § 2254(d) precludes habeas relief unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). See also Harrington, 131 S. Ct. at 785.

Further, "[f]ederal habeas courts generally defer to the factual findings of state courts, presuming the facts to be correct unless they are rebutted by clear and convincing evidence." Jones v. Walker, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (en banc); see also 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct."). However,

> when a state court's adjudication of a habeas claim result[s] in a decision that [i]s based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them.

Jones, 540 F.3d at 1288 n.5 (quotation marks and citations omitted); see also Panetti v. Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 2858 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied.").

If we determine that AEDPA deference does not apply, we must undertake a de novo review of the claim. McGahee v. Ala. Dep't of Corr., 560 F.3d 1252, 1266 (11th Cir. 2009).

III. Discussion

It is clearly established federal law that, under the Equal Protection Clause, a criminal defendant has a constitutional "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson, 476 U.S. at 85–86, 106 S. Ct. at 1717. In Batson, the Supreme Court established a three-step inquiry to evaluate a prosecutor's use of peremptory strikes. Id. at 96–98, 106 S. Ct. at 1723–24. The Court summarized Batson's inquiry in Miller-El I:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

537 U.S. at 328–29, 123 S. Ct. at 1035 (citations omitted).

Here, we focus on Batson's third step because the parties do not dispute that Mr. Adkins established a prima facie case of purposeful discrimination or that the state proffered race-neutral reasons for striking nine black jurors. Mr. Adkins's case was remanded by the Alabama Supreme Court for a Batson hearing, the state proffered race-neutral reasons for its peremptory strikes, and the trial court ruled on the ultimate question of discriminatory purpose. On the return from remand, the Alabama Court of Criminal Appeals determined that the trial court found "that a prima facie showing of discrimination had been made," Adkins IV, 639 So. 2d at 517, and that the prosecutor offered race-neutral reasons for its peremptory strikes of black jurors. Id. at 517–520. This satisfied Batson's first and second steps. Thus, we look to the state court's application of Batson's third step.

We also focus our analysis, at least for § 2254(d)(1) purposes, on the Alabama Court of Criminal Appeals decision on return from remand in Adkins IV, 639 So. 2d 515 (affirming determination that there was no Batson violation), because it is the last reasoned state court decision discussing Mr. Adkins's Batson claim.[6]

Before discussing that opinion, however, several important points about Batson's third step bear emphasis. First, it is a defendant's burden to prove purposeful discrimination at Batson's third step. See Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991); Batson, 476 U.S. at 98, 106 S. Ct. at 1724.

Second, the Supreme Court in Batson emphasized that "[i]n deciding whether the defendant has made the requisite showing [of purposeful discrimination], the trial court should consider all relevant circumstances." Batson, 476 U.S. at 96, 106 S. Ct. at 1723 (emphasis added). The reason for this is, without it, a court cannot meaningfully evaluate the state's proffered reason. See McGahee, 560 F.3d at 1261 ("Because courts must weigh the defendant's evidence against the prosecutor's articulation of a 'neutral explanation,' courts are directed by Batson

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[6] The Alabama Supreme Court summarily affirmed Mr. Adkins's appeal on the return from remand of his Batson hearing in Adkins V, 639 So. 2d 522. Thus, we "look through" to the Alabama Court of Criminal Appeals decision for the purpose of our analysis under § 2254(d)(1). See McGahee, 560 F.3d at 1261 n.12.

to consider 'all relevant circumstances' in the third step of the Batson analysis."). As the Supreme Court has said, a facially neutral reason, on its own, does not suffice to answer a Batson challenge. See Miller-El v. Dretke, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (Miller-El II) ("If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain[v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965), overruled by Batson, 476 U.S. at 100 n.25, 106 S. Ct. at 1725 n.25]."). It is thus abundantly clear that this principle is clearly established federal law. Under Batson, "a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Batson, 476 U.S. at 93, 106 S. Ct. at 1721 (quotation marks omitted).

With this being the state of the law, this Court has held a state court's failure to consider "all relevant circumstances" at Batson's third step is an unreasonable application of Batson under § 2254(d)(1). See McGahee, 560 F.3d at 1261–62.[7]

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[7] As this Court has observed:

> The Supreme Court has repeated this point in later opinions applying Batson. Snyder v. Louisiana, [552 U.S. at 478], 128 S. Ct. [at] 1208 ("[I]n considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted."); Miller El [II], 545 U.S. at 251–52, 125 S. Ct. at 2331–32 ("[T]he rule in Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in

Third, we are mindful that a finding of no intentional discrimination is a finding of fact that is ordinarily entitled to great deference. See Batson, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n.21. A federal habeas court must "presume the [state] court's factual findings to be sound unless [the petitioner] rebuts the 'presumption of correctness by clear and convincing evidence.'" Miller-El II, 545 U.S. at 240, 125 S. Ct at 2325 (quoting 28 U.S.C. § 2254(e)(1)). But with respect to a Batson claim in particular, the Supreme Court has stated:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. [A Batson claim] . . . can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were

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light of all evidence with a bearing on it."); Hernandez v. New York, 500 U.S. 352, 363, 111 S. Ct. 1859, 1868 (1991) ("An invidious discriminatory purpose may often be inferred from the totality of the relevant facts.") (quoting Washington v. Davis, 426 U.S. 229, 242, 96 S. Ct. 2040, 2048–49 (1976)).

McGahee, 560 F.3d at 1262 n.13.

> race based. It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case.

Miller-El I, 537 U.S. at 340, 123 S. Ct. at 1041.

A. The State Court's Application of Batson and Determination of the Facts

Our review of the state court record leads us to conclude that the Alabama Court of Criminal Appeals unreasonably applied Batson's third step when it failed to consider all relevant circumstances bearing on whether Mr. Adkins established purposeful discrimination. "Because courts must weigh the defendant's evidence [of purposeful discrimination] against the prosecutor's articulation of a 'neutral explanation,' courts are directed by Batson to consider 'all relevant circumstances' in the third step of the Batson analysis." McGahee, 560 F.3d at 1261. Failure to do so is an unreasonable application of Batson within the meaning of § 2254(d)(1). See Id. at 1261–62.

In Adkins IV, after reciting the procedural history of the case, the Alabama Court of Criminal Appeals implicitly turned to Batson's first step and stated:

> The trial court's findings show that the state struck 9 of the 11 black prospective jurors on the venire. One black ultimately sat on the jury. The court found that a prima facie showing of discrimination had been made and

> it held a hearing at which the prosecutor gave the following reasons . . . .

639 So. 2d at 517. The court then summarized the prosecutor's reasons and found at least one valid, race-neutral reason, to support each of the strikes. Id. at 517–20. Thus, the state court implicitly completed Batson's second step. From there, however, the Alabama Court of Criminal Appeals' entire discussion of the state's decision to strike Mr. Morris was limited to two sentences. The court stated it "will not reverse a trial court's decision on a Batson violation unless that decision is 'clearly erroneous,'" and then summarily concluded that "[w]e do not find the trial court's decision here clearly erroneous." Id. at 520. There is no indication from its opinion that the Alabama Court of Criminal Appeals considered any of the relevant circumstances bearing on the ultimate issue of discriminatory purpose beyond the fact that the prosecutor had proffered race-neutral reasons for its strikes. Because the Alabama Court did not even mention all the relevant circumstances brought to its attention by Mr. Adkins in his brief—circumstances that are supported by the record—we cannot say that it undertook "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Batson, 476 U.S. at 93, 106 S. Ct. at 1721 (quotation marks omitted); see also McGahee, 560 F.3d at 1261–62 (holding that the Alabama Court of Criminal Appeals unreasonably applied federal law that was clearly established in Batson when it failed to consider all relevant circumstances at Batson's third step).

Even giving the Alabama Court of Criminal Appeals the deference it is certainly due, we are left to conclude that it did not perform its duty under Batson's third step by considering the relevant circumstances raised by Mr. Adkins in his brief on return to remand to that court. These relevant circumstances include: (1) the strength of Mr. Adkins's prima facie case; (2) the fact that the prosecution explicitly noted the race of every black veniremember (and only black veniremembers) on the jury list the state relied on in jury selection; (3) the fact that specific proffered reasons provided by the prosecutor were incorrect and/or contradicted by the record; (4) the fact that the trial court relied upon, and did not subject to adversarial testing, an affidavit from the prosecutor that was submitted after the Batson hearing; and (5) the fact that the trial court relied upon facts not part of the record, such as the trial court's personal experience with the prosecutor in unrelated matters.

We will elaborate, first with regard to the strength of Mr. Adkins's prima facie case. During the voir dire in Mr. Adkins's case, the state used peremptory strikes to exclude nine of eleven eligible black jurors, resulting in a strike rate of eighty-two percent. Such a "seriously disproportionate exclusion" of blacks establishes a strong prima facie case. See Batson, 476 U.S. at 93, 106 S. Ct. at 1721 (quotation marks omitted). The Alabama Court of Appeals gave no consideration or weight to this almost complete elimination of black jurors.

Second, the Alabama Court of Criminal Appeals failed to consider the fact that the prosecution explicitly noted the race of every black veniremember, and only black veniremembers, on the jury list the prosecutor relied upon in striking the jury, marking each of them with a "BM" or "BF." This is strong evidence of discriminatory intent. See Miller-El I, 537 U.S. at 347, 123 S. Ct. at 1045 ("The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.").[8]

Third, the Alabama Court of Criminal Appeals did not consider the fact that specific proffered reasons provided by the prosecutor were contradicted by the record. During the Batson hearing, the prosecutor said he struck Billy Morris because Mr. Morris was single and had prior knowledge of the case. But the voir dire transcript clearly shows that Mr. Morris said he was married. The other reason given for striking Mr. Morris, that he had prior knowledge of the case, is hardly persuasive on the facts of this case. All but five or six of the sixty-four jurors on the venire knew about the case, including at least seven of the white jurors who served on the jury. These contradictions in the record are relevant because, "when illegitimate grounds like race are in

[8] Although we cite Miller-El I to support our conclusion, we need not rely on Miller-El I to draw the inference that racial notations created by the prosecution on jury strike sheets are relevant circumstances indicative of racial bias. Our conclusion is compelled by the facts.

issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." Miller-El II, 545 U.S. at 252, 125 S. Ct. 2332.

Fourth, the Alabama Court of Criminal Appeals ignored the fact that the trial court relied on evidence that was not tested by the adversarial process of cross-examination. Upon realizing after the Batson hearing that the prosecution's reason for striking Mr. Morris was not supported by the record (i.e., that he was not single), the trial court solicited and relied upon an ex parte affidavit from the prosecutor without giving Mr. Adkins an adequate notice or opportunity to be heard.[9] As we noted, the trial court on remand conducted the Batson hearing on July 29, 1992, at which time both parties presented evidence. On September 9, 1992, the trial court entered an order soliciting an explanation from the prosecutor for why Mr. Morris was struck for being single when the voir dire transcript indicated he was married. The order was apparently served on the prosecutor on September 9, 1992, but not on counsel for Mr. Adkins. The prosecutor responded to the Court's order by preparing an affidavit dated that same day. In the affidavit, the prosecution

[9] By ex parte, we mean the trial court solicited and considered evidence from one party only, without adequate notice or argument from Mr. Adkins. Mr. Adkins's counsel represented to the Alabama Court of Criminal Appeals that he received both the final order and the solicitation order "several days later" and the affidavit "was never served on defense counsel." The state does not dispute these facts.

claimed that it struck Mr. Morris under the mistaken belief that he was single. The next day, September 10, 1992—the day the record and trial court's order were due to be returned to the Alabama Court of Criminal Appeals—the trial court entered its order relying upon the prosecutor's affidavit in denying Mr. Adkins's Batson claim.

Six days later, Mr. Adkins's counsel objected to consideration of the ex parte affidavit and moved for the ex parte affidavit to be included in the record on appeal. Specifically, Mr. Adkins's motion stated he "was provided no notice, no opportunity to contest the reliability of the information solicited or relied upon through cross-examination or other means, and no opportunity to be heard." Generally, Mr. Adkins argued the trial court's solicitation and consideration of the affidavit deprived him due process.

Although Mr. Adkins's brief on return to remand to the Alabama Court of Criminal Appeals brought these crucial facts to the court's attention the court did not mention or consider them. See Adkins IV, 639 So. 2d at 517–520. The timing of the prosecutor's ex parte affidavit is relevant because it was offered only after the trial court brought contradictions in the record to the prosecutor's attention. As such, it is "difficult to credit" and "reeks of afterthought." Miller-El II, 545 U.S. at 246, 125 S. Ct. at 2328. Similarly, the state's submission of the affidavit to the trial court on the eve of the trial court's Batson ruling, without service to Mr. Adkins's counsel, is relevant because it assured the affidavit would not

be subjected to cross-examination or other adversarial testing.[10] Further, the Alabama Court of Criminal Appeals did not consider that the trial court relied not only on the ex parte affidavit, but also on non-record evidence which Mr. Adkins did not have an opportunity to rebut, such as the trial court's personal experience with and opinion about the reputation of the prosecutor.[11] These are relevant circumstances that should have been considered by the Alabama Court of Criminal Appeals at Batson's third step. Instead, the Alabama Court of Criminal Appeals never mentioned them.

We also conclude the state trial court's failure to consider all relevant circumstances in making its fact finding of no purposeful discrimination, as well

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[10] In other contexts, the Supreme Court has observed that "[t]he opportunity for cross-examination . . . is critical for ensuring the integrity of the fact-finding process. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Kentucky v. Stincer, 482 U.S. 730, 736, 107 S. Ct. 2658, 2662 (1987) (quotation marks omitted).

[11] The trial court based its finding of no purposeful discrimination in part on its own opinion of the prosecutor's reputation. However, there was no evidence presented during the Batson hearing about the prosecutor's reputation, other than assertions of good faith by the prosecutor. Neither was there evidence of the prosecutor's use of peremptory strikes against blacks in other criminal proceedings. It was therefore not reasonable for the trial court to interject non-record facts into its Batson analysis. Importantly, as with the prosecutor's affidavit itself, Mr. Adkins did not have notice or an opportunity to be heard on these matters.

as its consideration of an ex parte affidavit, is "an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Batson clearly established that the Alabama Court of Criminal Appeals was required to consider all relevant circumstances in making its ultimate factual determination. Because the court overlooked material facts in its factfinding, it not only unreasonably applied Batson, it also unreasonably determined the facts at Batson's critical third step.

In sum, we conclude the Alabama Court of Criminal Appeals unreasonably applied Batson because it failed to consider crucial facts which Mr. Adkins raised in his brief to that court relevant to Batson's third step. See McGahee, 560 F.3d at 1263 ("Because the court omitted from step three of its analysis crucial facts which McGahee raised in his brief to that court, we find that the Court of Criminal Appeals did not review 'all relevant circumstances' as required by Batson." (quoting Batson, 476 U.S. at 96, 106 S. Ct. at 1723)). For these reasons, we also conclude the state trial court unreasonably determined the facts based upon the state court record.

B. De Novo Review of Batson Claim

Where, as here, "we have determined that a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254(d), we are unconstrained by § 2254's deference and must undertake a de novo review of the record." McGahee,

560 F.3d at 1266. Our review of the record leads us to conclude that Mr. Adkins has met his burden at Batson's third step and shown purposeful discrimination as to Mr. Morris. See id. at 1267–68. We emphasize that our conclusion is not based upon any one particular fact, but the totality of relevant circumstances in this case. See Miller-El II, 545 U.S. at 251–52, 125 S. Ct. at 2331 ("[T]he rule in Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it.").

For example, we stress the strength of Mr. Adkins's prima facie case for discrimination. Batson recognized that "a 'pattern' of strikes against black jurors . . . might give rise to an inference of discrimination." Batson, 476 U.S. at 97, 106 S. Ct. at 1723. Again, the state here used peremptory strikes to exclude nine of eleven potential black jurors, resulting in a strike rate of eighty-two percent. Only one black juror served on Mr. Adkins's petit jury. The Supreme Court has observed that "total or seriously disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination." See Batson, 476 U.S. at 93, 106 S. Ct. at 1721 (quotation marks and citations omitted). Also here, like in Miller-El II, "[h]appenstance is unlikely to produce this disparity." 545 U.S. at 241, 125 S. Ct. at 2325 (quotation marks omitted); see also id. at 240, 125 S. Ct. at 2325 (describing the prosecutor's use of peremptories as "remarkable" where one black juror

served on the jury, but the prosecutor peremptorily struck ten of eleven eligible black jurors). We conclude the removal of so many eligible black jurors in Mr. Adkins's case is difficult to explain on nonracial grounds. But our conclusion is not based upon statistics alone.

The record of the voir dire and the Batson hearing also support the conclusion that Billy Morris was not excused for any legitimate reason. The state said that it struck Mr. Morris because he was single and had prior knowledge about the case. But in fact, Mr. Morris told the state during voir dire that he was married. What's more, almost all of the jurors on the venire had prior knowledge about the case, including the majority of white jurors who sat on the jury. See id. at 241, 125 S. Ct. at 2325 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."). The absence of a legitimate reason indicates Mr. Morris was removed because of his race. See, e.g., McGahee, 560 F.3d at 1267 (reason found pretextual where there was no evidence in the record to support it).[12]

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[12] The removal of even one juror for discriminatory reasons is sufficient to violate Batson. As this Court has previously stated, "under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." United States v. David, 803

It is also worth noting that our conclusion that the state struck Mr. Morris for racial reasons is buttressed as well by the fact that the prosecution explicitly noted the race of every black veniremember (and only black veniremembers) on its jury list in preparation for voir dire, and the fact that the prosecutor acknowledged at the Batson hearing that he "was not concerned with the Batson matter [during voir dire] because it [w]as a white-on-white [crime]." This statement from the prosecutor is an explicit acknowledgment that because Mr. Adkins's trial occurred before the Supreme Court's decision in Powers, 499 U.S. 400, 111 S. Ct. 1364, the prosecutor was not constrained by Batson in exercising his peremptory challenge against black jurors. See, e.g., Bui v. Haley, 321 F.3d 1304, 1314–16 (11th Cir. 2003) (finding, in a similar post-Powers remand context, that the prosecutor's belief at the time of voir dire that Batson did not apply to the defendant's case because the defendant was not black, was relevant to the prosecutor's state of mind and

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F.2d 1567, 1571 (11th Cir. 1986); see also Snyder, 552 U.S. at 478, 128 S. Ct. at 1208 ("Because we find that the trial court committed clear error in overruling petitioner's Batson objection with respect to [one juror], we have no need to consider petitioner's claim regarding [a second juror]."); Parker v. Allen, 565 F.3d 1258, 1270 (11th Cir. 2009) ("It is not necessary to show that all or even a majority of the prosecutor's strikes were discriminatory; any single strike demonstrated to result from purposeful discrimination is sufficient.").

indicated the prosecutor believed he could strike black jurors for any reason, including race).[13]

Our conclusion that the prosecutor exercised his peremptory strikes based on race is also bolstered by the fact that Mr. Morris was not the only black juror for whom the state offered reasons that were not supported by the record or were otherwise suspect because they applied to white jurors who were not excused. See, e.g., Adkins IV, 639 So. 2d at 521 (Bowen, J., dissenting) (identifying the prosecutor's reasons for striking jurors 56 and 60 as "highly suspect"). For example, besides age, the prosecutor

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[13] The prosecution's ex parte affidavit asserting a good faith mistake about Mr. Morris's marital status is not an adequate explanation for striking him. The affidavit was solicited long after the evidentiary hearing had concluded and without fair notice to or an opportunity to respond by Mr. Adkins. This type of evidence, not subjected to the crucible of adversary testing, has little weight. Neither can we ignore the fact that the prosecutor, with the benefit of the voir dire transcript and ample notice of the Batson hearing, clearly justified striking Mr. Morris because he was single at the Batson hearing. Indeed, we know from his testimony at the Batson hearing, the prosecutor had reviewed the transcript of the voir dire in preparation for the Batson hearing. Given these facts, and the strike rate of eighty-two percent of black jurors, a mere assertion of good faith that the prosecution believed Mr. Morris was single at the time of the Batson hearing is not sufficient to overcome the indication that the proffered reason was pretextual. Cf. Batson, 476 U.S. at 98, 106 S. Ct. at 1723–24 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirm[ing] [his] good faith in making individual selections.") (quotation marks omitted).

gave two reasons for the peremptory strike of black juror number 60: (1) her father was either in prison or had been in federal prison on drug related crimes; and (2) she did not respond during voir dire when jurors were "asked if they had any family member that had ever been in prison." Id. But as Judge Bowen observed in his dissent, "[t]o the extent that the strike of prospective juror number 60 was based on the [prosecutor's] assessment that the juror displayed a lack of forthrightness by failing to answer the voir dire question about 'family member[s] in prison,' that assessment was not supported by the record on voir dire." Id. (alteration in original). Indeed, the precise question asked by the prosecutor during the voir dire was this: "[I]s there anyone on the jury panel that has a relative or close friend, presently or in the past, in the State prison system?" Id. Based on this, Judge Bowen reasoned, and we agree,

> A reasonable juror with a friend or relative in the federal penitentiary could conclude that the question dealt solely with the State prison system, as specified, especially since the [prosecutor] inquired further whether the fact that any of the jurors had a relative or friend in the state penal system "would . . . make [them] feel ill toward the [prosecutor] because possibly people like us are responsible for putting a relative or loved one or friend in prison?"

Id. (alteration in original). While the prosecutor may have been justified in striking juror 60 based on information that her father had been in prison, "[t]he credibility of that reason, however, was called into question by the fact that the district attorney failed to strike at least one white veniremember [juror 48] who answered that he had a brother-in-law in prison. That veniremember in fact served on the jury." Id. (citation and footnote omitted). Again, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El II, 545 U.S. at 241, 125 S. Ct. at 2325.

In this same vein, we note that the state struck prospective black juror number 56 because he was 86 years old, could not hear well, and "acknowledged that he knew [defense counsel] personally." Adkins IV, 639 So. 2d at 521 (Bowen, J., dissenting) (alteration in original). While each of these reasons may be facially race-neutral, two of them are suspect here. The prosecutor's reliance on the fact that juror 56 knew defense counsel is suspect because the state did not strike a white verniremen, juror 48, who also acknowledged he knew defense counsel. Id. Indeed, the prosecutor did not strike juror 48, and this juror served on the jury, even though he "shared two characteristics used [by the prosecutor] to justify the strikes of blacks—that he knew defense counsel and that he had a relative in prison." Id. at 522. This is further indication, under the third step of the Batson

analysis, that the prosecutor's stated reasons for striking black jurors were pretextual. Id.

Similarly, and again under this required analysis, the prosecutor's reliance on juror 56's age is suspect in light of the fact that the prosecutor proffered "age" as a reason for striking six prospective black jurors, ranging in age from 31 to 86 years old: black juror 59, age 61; black juror 52 (age 32); black juror 36 (age 53); black juror 56 (age 86); black juror 14 (age 36); and black juror 60 (age 31). With respect to age, the prosecutor stated during the Batson hearing that "the defendant was a single male and in that same age bracket of these people that were struck." Mr. Adkins was twenty-three years old at the time of voir dire. The prosecutor's "same age bracket" rationale clearly did not apply to all of the six black jurors struck by the prosecutor on this basis.

The prosecutor's reliance on age to strike prospective black jurors is also undermined by the fact that the state did not strike white jurors of similar age. For example, the prosecutor did not strike white juror 6 (age 44); white juror 13 (age 48); white jury 29 (age 48); white juror 28 (age 49); white juror 20 (age 58); and white juror 17 (age 62). The prosecutor's proffered justification of age as a reason to strike such a wide range of prospective black jurors who were clearly not in the "same age bracket" as Mr. Adkins, and the fact that white jurors of similar age were allowed to serve, supports our conclusion that the prosecutor's reliance on age was pretextual. This fact, when considered with all of the

other relevant circumstances bearing on whether the defendant has proved purposeful discrimination, bolsters our conclusion that there was a Batson violation in Mr. Adkins's case.

IV. Conclusion

For all these reasons, AEDPA deference does not apply to the state courts' unreasonable application of Batson and unreasonable determination of facts based on the state court record. This record compels a finding that the state used its peremptory strikes in a discriminatory manner and violated Mr. Adkins's right to Equal Protection as clearly established by Batson. See McGahee, 560 F.3d at 1270. Any contrary finding would be inconsistent with the clear and convincing evidence.

The District Court's order denying Mr. Adkins habeas relief is reversed, and the case is remanded to the District Court with instructions to issue the writ of habeas corpus conditioned on the right of the State of Alabama to retry him.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, dissenting:

The issue in this appeal according to the certificate of appealability ("COA") the District Court issued[1] is "whether the State unconstitutionally exercised its peremptory challenges by striking African-American jurors on the basis of their race in violation of" Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Alabama Court of Criminal Appeals decided that the strikes did not deny those jurors their right to serve on Ricky Dale Adkins's jury on account of their race. Adkins v. State, 639 So. 2d 515 (Ala. Crim. App. 1993). Adkins argues that the court's decision cannot be sustained because it is "based on an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2) (2006), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996); the State argues to the contrary. Today, this court adopts Adkins's position, reverses the District Court's decision adopting the State's position, and directs the District Court to issue a writ of habeas corpus setting aside Adkins's murder conviction and death sentence. I am convinced the court errs in ordering that the writ issue and therefore dissent.

Although, on its face, the opinion of the Court of Criminal Appeals states that the court decided a Batson claim, the COA poses a Batson issue and the parties have briefed that issue, I submit that the

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[1] See 28 U.S.C. § 2253(c).

Court of Criminal Appeals, though its opinion purports to do so, did not decide a Batson claim at all; rather, it decided a state law claim bearing the Batson label. Accordingly, because the Court of Criminal Appeals adjudicated a determination of state law, the District Court lacked Article III power to review that determination. The same is true of this court.

I explain why in part III of this opinion, after describing, in part I, the circumstances that led to Billy Dean Hamilton's murder and Adkins's conviction, and in part II, the Alabama Supreme Court's creation of the claim Adkins is asserting.

I.

The Alabama Court of Criminal Appeals described how Mrs. Hamilton's murder occurred in Adkins v. State, 600 So. 2d 1054 (Ala. Crim. App. 1991) (as corrected on denial of rehearing).

Mrs. Hamilton was a realtor. During the morning of Sunday, January 17, 1988, she left her home to put out some real estate signs and to go to her office to do some paperwork. As she was putting out a sign, Adkins drove up in a Ford Bronco and told her that he was looking for a house to buy. She agreed to show him some that were for sale and got into his Bronco. According to Adkins at trial, after seeing three or four houses, "they stopped at a park, and 'held hands and kissed.'" Id. at 1058. They stayed there for about thirty minutes, then left to look at more houses. "At one of the vacant houses they

looked at, [Adkins] claim[ed], Mrs. Hamilton voluntarily had sex with him twice." Id. That evening, after visiting with the owners of one of the houses for sale, Mrs. Hamilton, according to Adkins, "directed him down a dirt road for one last sexual encounter." Id. at 1059. He put his sleeping bag on the ground and said that they "'talked about the stars and the night.'" Id.

> [A]fter they finished having sex, he put the sleeping bag back in the Bronco and told Mrs. Hamilton to hurry and get dressed. [He] claims that [she] called him a "bastard" and that he told her that she was "nothing but a whore." At this, he said, [she] slapped him. [He] stated that as [she] bent over to pull her jeans up, he hit her in the back of the head with a wrench. [He] said he next remembered seeing his victim lying on the ground with blood on her body. He admitted slashing both of her wrists. He says he then got in the Bronco and left.

Id. Dr. Joseph Embry, a pathologist with the Alabama Department of Forensic Sciences, performed the autopsy.

> Dr. Embry observed seven very deep lacerations to the victim's scalp. There was a stab wound to the upper abdomen which was six and a half inches long. It extended into the liver, stomach, and heart.

> There were six small scratches on the victim's left buttock which were consistent with fingernail scratches. She also had a bruise on the inside of her left thigh. There were bruises, scrapes and lacerations on both hands. [He] testified that these were defense wounds.
>
> When [he] examined the victim's oral cavity and lungs, her mouth and throat were filled with dirt and small rocks that went through her larynx all the way down into her lungs. It was this impacted dirt in the victim's airway, in association with the stab wounds and blunt force trauma to the head, that caused the victim's death. [He] testified that the incisions through the tendons of the victim's wrists appeared to be post-mortem because there was no bleeding in the wounds.

Id. at 1059–60.

The jury convicted Adkins of capital murder and, by a vote of 10 to 2, recommended that he receive the death penalty. The Circuit Court followed the recommendation and sentenced Adkins to death. Adkins then appealed his conviction and sentence.

II.

The Court of Criminal Appeals affirmed Adkins's conviction and death sentence on January 18, 1991. Adkins v. State, 600 So. 2d 1054, 1067 (Ala. Crim. App. 1991). The Alabama Supreme Court thereafter

granted Adkins's petition for certiorari review. Ex parte Adkins, 600 So. 2d 1067, 1068 (Ala. 1992). While the case was being briefed in that court, the United States Supreme Court decided Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), which held that, under the Equal Protection Clause, "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races." Id. at 402, 111 S. Ct. at 1366 (internal quotation marks omitted) (emphasis added). Citing Powers, Adkins urged the Alabama Supreme Court to invoke Alabama's "plain error" doctrine[2] and remand the case to the Circuit Court for a hearing on whether the prosecutor had used any of the State's peremptory challenges to discriminate against black

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[2] The plain error doctrine is a statutory creation to be used in capital cases in which the death penalty is imposed. Rule 45A, Alabama Rules of Appellate Procedure, "Scope of review in death cases," states:

> In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.

In Adkins's case, the Court of Criminal Appeals could not have noticed plain error on the basis of Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), because Powers was decided after the court had affirmed Adkins's conviction and sentence.

members of the venire. The Supreme Court noticed plain error[3] and, after affirming "each of the issues presented to [the Court of Criminal Appeals]," Ex parte Adkins, 600 So. 2d at 1068, remanded the case for a hearing on the issue of whether, under Powers, "the State improperly exercised its peremptory challenges by striking black jurors on the basis of their race," id. at 1069.[4]

On remand, the Circuit Court, following the Alabama Supreme Court's instructions (albeit implicit), used the three-step inquiry the United States Supreme Court fashioned in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986),[5] in deciding whether the prosecutor peremptorily challenged the black jurors solely because of their race. The first step required Adkins to make a prima facie showing that the prosecutor "exclude[d] [an] otherwise qualified and unbiased

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[3] The court cited Ex parte Bankhead, 585 So. 2d 112 (Ala. 1991), as its authority.

[4] The Supreme Court remanded the case to the Court of Criminal Appeals; it, in turn, remanded the case to the Circuit Court for the hearing. Adkins v. State, 639 So. 2d 515 (Ala. Crim. App. 1993).

[5] The three-step model in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is akin to the model the Supreme Court created in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for adjudicating Title VII claims of racial discrimination in employment, where, say, a member of a protected class claims that he or she was denied employment or a promotion due to race.

person[ ] from the petit jury solely by reason of [his or her] race." Powers, 499 U.S. at 409, 111 S. Ct. at 1370. The Alabama Supreme Court had already made that prima facie showing for Adkins when, under the "plain error" doctrine, it ordered his case "remanded to the circuit court for a hearing on" the "Batson issue." Ex parte Adkins, 600 So. 2d at 1069. The Circuit Court therefore began with the second step of the inquiry, requiring the prosecutor to offer a race-neutral reason for each of his strikes. After the prosecutor came forward with his reasons, the court took the third step, inquiring whether Adkins had proven that the prosecutor had struck any of the nine blacks solely because of the person's race. At the conclusion of the inquiry, the court credited the prosecutor's representation that he struck the blacks for non-racial reasons and upheld the constitutionality of his strikes.

On return from remand, the Court of Criminal Appeals, "[a]fter a careful review of the reasons given by the prosecutor and after examining the testimony taken at the Batson hearing, . . . f[ound] that no Batson violation occurred." Adkins v. State, 639 So. 2d 515, 517 (Ala. Crim. App. 1993). The court therefore affirmed the Circuit Court's judgment. Id. at 520.

The majority of this panel faults the Court of Criminal Appeals' decision because the Court of Criminal Appeals "did not give any consideration at Batson's third step to several relevant circumstances raised by Adkins in his brief on return to remand to

that court." Ante at 16. For example, the court gave "gave no consideration to the strength of Adkins's prima facie case at Batson's third step," id.; to "the fact that specific proffered reasons provided by the prosecutor were contradicted by the record," id.; or to "the fact that the trial court relied on evidence that was not tested by the adversarial process of cross-examination," id. at 18, i.e., the prosecutor's affidavit stating that he "struck Morris under the mistaken belief that he was single," id. at 18–19. Given these shortcomings in the Court of Criminal Appeals decision, the majority concludes that the Court of Criminal Appeals "unreasonably applied Batson because it failed to consider crucial facts which Adkins raised in his brief to that court relevant to Batson's third step," and therefore failed to review "'all relevant circumstances' as required by Batson." Id. at 21–22. As a consequence, the Court of Appeals decision is afforded no AEDPA fact-finding deference, id.; see 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct."), and this court reverses the judgment of the District Court, instructing the District Court "to issue the writ of habeas corpus conditioned on the right of the State of Alabama to retry Adkins." Ante at 31.

III.

The federal habeas corpus statute, 28 U.S.C. § 2254, as amended by AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996), and interpreted by the United States Supreme Court, forbids a federal court from

reviewing a state court conviction to grant a writ of habeas corpus unless the state court adjudication of the claim "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." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" refers only to "the holdings, as opposed to the dicta," of the Supreme Court decisions extant at the time of the state court adjudication. Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000) (emphasis added).

The first task the District Court faced in this case in reviewing the Alabama Court of Criminal Appeals decision was to determine whether that court "adjudicated [a federal constitutional claim] on the merits." 28 U.S.C. § 2254(d). According to the parties, the Court of Criminal Appeals adjudicated a Powers claim using the Batson three-step inquiry. To possess a Powers claim or a Batson claim, a defendant must have objected to the prosecutor's exercise of a peremptory challenge for a discriminatory purpose, to exclude the venireperson from jury service. See United States v. Tate, 586 F.3d 936, 943 (11th Cir. 2009) ("Under the law of this Circuit, a defendant forfeits a Batson claim if he or she fails to object on this ground in the district court.").[6] "[A] Batson objection must be exercised

[6] It is of no consequence that Powers had not been decided at the time of Adkins's trial. For new rules of conduct of criminal trials to apply retroactively, defendants must preserve their constitutional claims with objections. See Griffith v.

before the venire is dismissed and the trial commences." Id.[7] Requiring an objection prevents "sandbagging." United States v. Pielago, 135 F.3d 703, 709 (11th Cir. 1998) ("The contemporaneous objection rule fosters finality of judgment and deters 'sandbagging,' saving an issue for appeal in hopes of having another shot at trial if the first one misses.").[8]

Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); see also Jones v. Butler, 864 F.2d 348, 363–64 (5th Cir. 1988) (declining to excuse petitioner's failure to object to allegedly discriminatory peremptory strike even though Batson had not been decided at the time of his trial because "the claim was familiar and had been asserted in many other cases. . . . 'Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.'" (quoting Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575, 71 L. Ed. 2d 783 (1982))).

[7] In United States v. Tate, the appellant argued that the district court erred because it "failed to elicit or even provide counsel an[] opportunity to object." 586 F.3d 936, 943 (11th Cir. 2009). This court "declin[ed] the invitation" to create a new rule mandating that district courts provide counsel with an opportunity to raise Batson objections. Id. at 944.

[8] The majority notes that "state courts are free to fashion and enforce their own procedural rules to require that defendants make contemporaneous objections to preserve constitutional claims," ante at 12, but that Alabama courts did the opposite in this case—they excused Adkins's failure to object. The majority then notes that it is not our province to "dictate to the state courts of Alabama which procedural rules they should adopt." Ante at 15. Although it is true that Alabama courts are free to allow an equal-protection challenge to a peremptory strike without a contemporaneous objection as

Adkins did not have a Powers claim because he did not object to any of the prosecutor's peremptory strikes.[9] That the Circuit Court on remand and the

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a matter of state law, they are not free to excuse the requirement of an objection as a matter of federal constitutional law. The Supreme Court has never explicitly defined "timely" in the context of a Batson challenge, but several of our sister circuits have noted that the Supreme Court in Batson plainly envisioned an objection during jury selection. These circuits have refused to grant a writ of habeas corpus where the petitioner did not preserve his claim with an objection. See Haney v. Adams, 641 F.3d 1168, 1169 (9th Cir. 2011) (holding that a petitioner may not bring a Batson claim in his habeas petition if he did not object to the peremptory strikes during his state trial); McCrory v. Henderson, 82 F.3d 1243, 1249 (2d Cir. 1996) (reversing a district court's grant of a writ of habeas corpus where the defendant did not preserve his claim of a discriminatory peremptory strike with a contemporaneous objection); Jones v. Butler, 864 F.2d 348, 369 (5th Cir. 1988) (denying rehearing en banc regardless of whether Louisiana state courts applied a state procedural bar because "a contemporaneous objection to the use of peremptory challenges to exclude jurors on the basis of race is a necessary predicate to later raising a Batson claim"). Because Adkins did not meet this "necessary predicate" to a federal constitutional claim, he may not ask for federal habeas relief.

[9] The Alabama Supreme Court would undoubtedly agree that if Adkins were not a death case reviewed under Rule 45A, Alabama Rules of Appellate Procedure, Adkins would not have a Powers claim—because he did not object to any of the prosecutor's strikes. This underscores my point that, in Ex parte Adkins, the Alabama Supreme Court fashioned an equal protection rule that applies only in death cases. The rule does not apply in non-death cases. In those cases, a defendant cannot seek a remand for a Batson hearing unless he objected to the prosecutor's peremptory strike before the jury is empaneled.

Court of Criminal Appeals on return to remand may have thought they were deciding a Powers claim does not mean that Adkins had a viable Powers claim—that Powers's holding required the Alabama Supreme Court to remand the case for a Batson hearing. What those courts were doing on remand was resolving an equal protection of the laws issue—whether any of the nine blacks were struck from the venire due to race—using Batson's three-step inquiry.

An equal protection issue like the one in Ex parte Adkins arises whenever the Court of Criminal Appeals (or the Supreme Court on certiorari review as in Ex parte Adkins), in discharging its statutory obligation to search the record in death cases for plain error,[10] finds that the defendant had grounds to object to the prosecutor's strike of a prospective juror due to the juror's race, but did not. Once that finding is made, the case must be remanded to the trial court for a Batson hearing. At the hearing on remand, because a prima facie case of race discrimination has already been found by the appellate court, the trial court begins with Batson's second step, and if the prosecutor provides race-neutral reasons for the strikes at issue, the court moves to the third step and determines "whether the defendant has carried his burden of proving purposeful discrimination." Floyd v. State, —So. 3d

[10] If the Court of Criminal Appeals has not found sufficient indicia to create an inference of unlawful discrimination, there would be no reason to remand the case for a Batson hearing.

—, 2012 WL 6554696, at *1 (Ala. Crim. App. Dec. 14, 2012) (quoting Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991)) (internal quotation marks omitted).

The Alabama courts refer to this plain error-generated equal protection issue as a Powers claim or a Batson claim. Where the equal protection issue is gender-based, the courts refer to the issue as a J.E.B. claim. See J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (applying Batson and Powers to gender-based discrimination).

In Ex parte Floyd, —So. 3d —, 2012 WL 4465562, at * 6–11 (Ala. Sept. 28, 2012) (Murdock, J., concurring in the result), Justice Murdock, criticizing the Supreme Court's creation of this equal protection claim by noticing plain error, explained why the claim is not rooted in the Batson, Powers, and J.E.B., decisions but, instead, was the court's creation. In that case, Christopher Anthony Floyd was convicted of capital murder and sentenced to death. On appeal, Floyd argued that the prosecutor had exercised the State's peremptory challenges to strike blacks and women from the venire for the purpose of excluding them from jury service on account of their race and sex. Floyd v. State, 2007 WL 2811968, at *1 (Ala. Crim. App. Sept. 28, 2007). Floyd had not objected to the strikes in the trial court, and therefore asked the Court of Criminal Appeals to notice plain error, citing Batson, Powers, and J.E.B. The Court of Criminal Appeals concluded that the record established an inference of purposeful race- and

gender-based discrimination and remanded the case to the trial court for a Batson hearing. Id. at *3.

On remand, the trial court found that the prosecutor's reasons for the strikes were race- and gender-neutral. On return to remand, the Court of Criminal Appeals affirmed the trial court's findings and affirmed Floyd's murder conviction and death sentence. Id. at *33 (opinion on return to remand, Aug. 29, 2008).

On writ of certiorari, the Alabama Supreme Court reversed and instructed the Court of Criminal Appeals to remand the case again to the trial court for findings of fact and conclusions of law as to whether the prosecutor's reasons for striking blacks and women were race- and gender-neutral and whether the defendant had carried his burden of proving purposeful discrimination. Ex parte Floyd, — So. 2d —, 2012 WL 4465562, at *6 (Ala. Sept. 28, 2012).[11]

Justice Murdock, joined by Justices Malone and Bolin, concurred in the result but opposed the practice of giving defendants who had waived their Batson, Powers, and J.E.B. objections at trial an opportunity for a Batson hearing in the trial court for the purpose of having the State offer nondiscriminatory reasons for its peremptory strikes.

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[11] The Court of Criminal Appeals, on receipt of the Supreme Court's mandate, remanded the case to the trial court with the Supreme Court's instructions. Floyd v. State, — So. 3d —, 2012 WL 6554696 (Ala. Crim. App. Dec. 14, 2012).

In Justice Murdock's opinion, what his court was doing was contrary to the holdings in Batson and its progeny:

> [T]he three-step evidentiary inquiry prescribed by Batson as a tool for ferreting out purposeful discrimination was intended only for use in "real time" during the trial in which the alleged discrimination occurs and . . . the right to initiate a Batson inquiry is waived if not exercised contemporaneously with the selection of the jury and cannot be revived based on a plain-error review in an appeal after the trial is concluded.

Floyd, 2012 WL 4465562, at *6 (Murdock, J., concurring). Justice Murdock

> found no federal cases that hold to the contrary or that even stand as contrary physical precedent. That is, I have found no federal cases in which the court has used a "plain error" review to initiate a Batson inquiry on appeal when the defendant failed to initiate that inquiry during the trial. There appear to be good reasons why it is so difficult to find such a case.

Id. (emphasis in original). In his view,

> [T]here [we]re sound "policy" reasons why a Batson inquiry, if it is to be conducted, must be conducted at trial contemporaneously with the jury-selection process that is its subject. If

> the inquiry is launched before the jury is sworn or before the venire is excused, remedies other than reversal and retrial are available. More importantly, in most cases, the type of inquiry contemplated by Batson simply cannot be undertaken in any meaningful way months or years after the trial. Pretrial research regarding jurors and real-time notes taken during voir dire may have been lost, and, more importantly, unwritten memories and impressions of body language, voice inflections, and the myriad of other nuances that go into striking jurors likely will have faded, not only for counsel, but also for the judge who must evaluate the positions of both the defendant and the prosecutor in the context of his or her own observations at trial (and who, in some cases, will have even left the bench in the meantime).

Id. at *7. Justice Murdock amplified the Batson Court's recognition that "'a finding of intentional discrimination is a finding of fact' and that 'the trial judge's findings . . . largely will turn on evaluation of credibility,'" id. at *8, with this quotation from Snyder v. Louisiana:

> The trial court has a pivotal role in evaluating Batson claims. Step three of the Batson inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the

> challenge." In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]."

552 U.S. 472, 477, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008) (internal citations omitted) (emphasis in original).

An obvious reason for abandoning this plain error practice in cases like Adkins and Floyd is the effect it must have on trial judges in capital cases. Nothing is more onerous for trial judges than having to try a criminal case twice, especially a capital case in which the State is seeking the death penalty. Because the holdings in Batson, Powers, and J.E.B. condemn the discriminatory exercise of peremptory challenges based on race and gender, a trial judge, to ensure that the case will not be remanded for a Batson hearing, will be tempted to require the prosecutor to

provide race- or gender-neutral reasons for many if not all of the State's strikes.[12] The practical effect of the possibility of a later Batson hearing would be to eliminate the peremptory challenge in death cases. Nothing in Batson, Powers, or J.E.B. requires the Alabama courts to go to that extreme.[13]

The majority treats the Alabama Court of Criminal Appeals decision as having adjudicated a federal constitutional claim on the merits for purposes of § 2254(d) because the State, in the

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[12] Defense counsel, who like the prosecutor is a state actor when exercising peremptory strikes, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628, 111 S. Ct. 2077, 2087, 114 L. Ed. 2d 660 (1991), also denies a venireperson the equal protection right to jury service when not objecting to what appears to be an unconstitutional strike. The Supreme Court's opinion remanding Adkins's case for a Batson hearing is silent regarding the relevance of evidence that defense counsel, in failing to object, might be complicit in the presumed racial discrimination by the State.

[13] One of the reasons why the Batson, Powers, and J.E.B. holdings do not go to such an extreme is this: When defense counsel does not object to the prosecutor's strike, defense counsel is indirectly informing the court that it would be in the best interest of counsel's client that the challenged venireperson not serve on the jury, that, in counsel's mind, it is doubtful whether the venireperson would be impartial and reach a fair verdict. Given this evidence—the failure to object and the communication it yields—the inference that the venireperson is being challenged in violation of the Equal Protection Clause is problematic. If that inference is problematic, whether the inference is strong enough to establish a case of unlawful discrimination is likewise problematic.

District Court and in its brief on appeal, agreed that the decision adjudicated a Batson claim. It argues that United States v. Nealy, 232 F.3d 825 (11th Cir. 2000), and United States v. Ardley, 242 F.3d 989 (11th Cir. 2001), therefore bar the State from switching positions and arguing that the decision at issue adjudicated a state law claim.

Our decisions in Ardley and its progeny involve direct appeals of federal court convictions, not habeas petitions. In the Ardley appeal, we declined to retroactively apply the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), which was decided after the appellant was convicted but before his conviction became final, because he had not raised the Apprendi issue in his opening brief on appeal. 273 F.3d at 1007. Since Ardley, we have repeatedly followed the prudential rule that we will not consider the merits of issues not raised in the opening brief, even where they would be resolved in appellant's favor but for his failure to anticipate the new rule of law in his opening brief. See United States v. Levy, 391 F.3d 1327, 1328 (11th Cir. 2004) (denying appellant's petition for rehearing after his conviction had become final because he had failed to raise a claim under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), until his petition for rehearing); United States v. Dockery, 401 F.3d 1261, 1262–63 (11th Cir. 2005) (holding that the appellant had abandoned his claim under United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), by failing to address the claim

Booker created in his opening brief on appeal); United States v. Vanorden, 414 F.3d 1321, 1323 (11th Cir. 2005) (holding that appellant had abandoned any Apprendi-Blakely-Booker claim by failing to brief it); United States v. Higdon, 418 F.3d 1136, 1137 (11th Cir. 2005) (Hull, J., concurring in denial of rehearing en banc) (declining to reconsider panel's denial of appellant's motion to file a supplemental brief raising a claim under Blakely).

Although these decisions would seem at first blush to bar our consideration of the State's argument that the Court of Criminal Appeals did not adjudicate a federal constitutional claim, I submit that the prudential rule on which they are based must give way to the policies AEDPA seeks to implement, namely the interests of federalism, comity and finality of state criminal convictions. See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing before the S. Comm. on the Judiciary, 104th Cong. 1, 10, 23, 30–31 (1995) (statements of Sen. Orrin Hatch; Lee Chancellor, Vice President, Citizens for Law and Order, Oakland, Calif.; Sen. Strom Thurmond; and Daniel E. Lungren, California Attorney General). As I have written before, waiver "applies to the right of a litigant to have his claim heard. . . . The scope of a petitioner's rights has no bearing on this court's power. It is beyond dispute that, in general, we have the power to consider issues that a party fails to raise on appeal, even though the petitioner does not have the right to demand such consideration." Thomas v. Crosby, 371 F.3d 782, 793 (11th Cir. 2004)

(Tjoflat, J., specially concurring). The Supreme Court has said, "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826 (1976).

Our task in this case is to determine whether the Alabama Court of Criminal Appeals decision falls within § 2254(d)(1) or (2).[14] In the context of a habeas petition, we would be remiss if we did not consider sua sponte whether the petitioner has a federal constitutional claim. Because Adkins did not object to the allegedly discriminatory peremptory strikes, he did not preserve his Powers claim. The Alabama courts thus adjudicated a state law claim, and we should not grant federal habeas relief under AEDPA.

In sum, the Alabama Court of Criminal Appeals decision under consideration did not adjudicate a claim contrary to a holding of the United States Supreme Court. For that reason, the judgment of the District Court should be affirmed.

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[14] See Harrison v. Richter, — U.S. —, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.").

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

RICKY DALE ADKINS,	)	
Petitioner,	)	
vs.	)	**CASE NO. 4:06-CV-4666-SLB**
GRANT CULLIVER, Warden; RICHARD F. ALLEN, Commissioner, Alabama Department of Corrections,	)	
Respondents.	)	

MEMORANDUM OPINION

This case is presently pending before the court on petitioner's Objections to the Magistrate Judge's Report and Recommendation. (Doc. 28.)[15] Upon consideration of the record, the Report and Recommendation, Adkins's Objections, and the relevant law, the court is of the opinion that Adkins's Objections are due to be overruled, the Report adopted, with the modifications set forth below, and the Recommendation accepted.

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[15] Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

Adkins objects to the Magistrate Judge's Report and Recommendation on the following grounds:

> I. The state unconstitutionally exercised its peremptory challenges by striking African-American jurors on the basis of their race.
>
> II. Petitioner was denied a fair and impartial judge due to judicial conflict of interest and the appearance of impropriety.
>
> III. Trial counsel rendered ineffective assistance during the penalty phase and guilt phase of trial as well as during pre-trial litigation.
>
> IV. The trial court's jury instruction regarding reasonable doubt was improper and unconstitutional.

The court, after careful and searching review of the record and in consideration of the Magistrate Judge's comprehensive discussion of the issues, finds only issues I and II of Adkins's objections merit further discussion.

A. THE STATE UNCONSTITUTIONALLY EXERCISED ITS PEREMPTORY CHALLENGES BY STRIKING AFRICAN-AMERICAN JURORS ON THE BASIS OF THEIR RACE.

The Supreme Court has established a "three-step inquiry" for evaluating "defendant's *Batson* challenge to a peremptory strike." *Rice v. Collins*, 546 U.S. 333, 338 (2006).

> First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Rice, 546 U.S. at 338 (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); citing *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986))(internal quotations and citations omitted). Petitioner contends, "Both the Alabama Court of Criminal Appeals and the Magistrate Judge ended their analysis at step two of the *Batson* inquiry." (Doc. 28 at 3.) The court disagrees.

The trial court specifically found "no purposeful racial discrimination in the [peremptory] strikes

exercised by the State as to Billy Morris, or any other black juror struck." (Vol. 8, Tab 27 at 48-49.) The opinion of the Alabama Court of Criminal Appeals found, expressly, that the trial court had gone "to great lengths to determine the ***motive*** behind each strike" and accorded that finding the deference it deserved. *Adkins v. State*, 639 So. 2d 515, 519 (Cr. App. 1993)(emphasis added), *aff'd* 639 So. 2d 522 (Ala.), *cert. denied* 513 U.S. 851 (1994). Likewise, the Magistrate Judge correctly set forth the applicable law for step three, but erroneously referred to it as step two. (Doc. 26 at 61.) He stated, "The proper focus required by ***step two*** is of the genuineness of the motive rather than the reasonableness of the asserted nonracial motive. (*Id*. [citing *Purkett*, 514 U.S. at 768- 69](emphasis added).) However, he clearly recognized that the question at step three is the "genuineness" of the prosecutor's motive. (*See id*. at 62 ["At step three, it was for the court to determine whether the prosecutor struck Morris because he believed him to be single."].) In *Purkett*, the Supreme Court held:

> The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Batson*, supra, 476 U.S., at 98, n. 20, 106 S. Ct., at 1724, n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 1096, 67 L. Ed. 2d 207 (1981)), and that the

reason must be "related to the particular case to be tried," 476 U.S., at 98, 106 S. Ct., at 1724. *See* [*Elem v. Purkett*,] 25 F.3d [679,] 682, 683 [(8th Cir. 1994)]. This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. See *Hernandez* [*v. New York*], [500 U.S. 352,] 359, 111 S. Ct. [1859,] 1866[, 114 L. Ed. 2d 395 (1991)(plurality opinion)]; cf. *Burdine*, *supra*, at 255, 101 S. Ct., at 1094 ("The explanation provided must be legally sufficient to justify a judgment for the defendant").

The prosecutor's proffered explanation in this case – that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard – is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike. . . . Thus, the inquiry properly proceeded to step three, where the state court found that the prosecutor was not motivated by discriminatory intent.

In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly

> supported by the record." 28 U.S.C. § 2254(d)(8). See *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S. Ct. 843, 849, 74 L. Ed. 2d 646 (1983). Here the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record. For its whole focus was upon the ***reasonableness*** of the asserted nonracial motive (which it thought required by step two) rather than the ***genuineness*** of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility, see *Batson*, 476 U.S., at 98, n.21, 106 S. Ct., at 1724, n.21. Cf. *Marshall*, *supra*, at 434, 103 S. Ct., at 850.

Purkett, 514 U.S. at 768-69.

The court finds petitioner's objection to the Report and Recommendation on the ground that "[b]oth the Alabama Court of Criminal Appeals and the Magistrate Judge ended their analysis at step two of the *Batson* inquiry," (doc. 28 at 3), is not well taken.

Adkins also argues that "the totality of the evidence established discrimination by the prosecution in its use of peremptory strikes." (*Id*. at 4.) He contends that the Alabama Court of Criminal Appeals and the Magistrate Judge failed to consider "all relevant circumstances," and only evaluated the

prosecutor's "reasons in isolation as to their facial race neutrality." (*Id.* at 15.) He argues the "relevant circumstances" include the statistical improbability of "striking of 82% of the black jurors" for race-neutral reasons; "the lack of record support for the prosecution's proffered reasons for some of the strikes[;] the prosecution's acceptance of white prospective jurors sharing the same characteristics of blacks who were struck[;] the weakness and vague nature of the reasons proffered, the prosecution's failure to question some black jurors regarding the reasons it gave for striking them[;] and the clear consciousness throughout the prosecution's notes regarding the race of only the black veniremembers." (*Id.* at 2.)

Because this issue is before the court on a Petition for Writ of Habeas Corpus, the court's review of the trial court's finding is deferential:

> On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. Under AEDPA, however, a federal habeas court must find the state-court conclusion an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Thus, a federal habeas court can only grant [the habeas] petition if it was ***unreasonable*** to credit the prosecutor's race-neutral explanations for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the

> burden of rebutting the presumption by clear and convincing evidence.

Rice, 546 U.S. at 338-39 (internal citations and quotations omitted). Although "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility," this court may not grant relief unless it determines "that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude [Adkins] had shown a *Batson* violation." *Id.* at 341-42.

The ultimate question is whether the prosecutor exercised his peremptory challenges to strike African-Americans based on their race. The fact that the prosecutor's reasons for exercising his strikes are "unpersuasive, or even obviously contrived, does not necessarily establish that [Adkins's] proffered reason [for the strikes – race discrimination –] is correct." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000)(internal quotations and citations omitted), *cited in Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). Finding that the prosecutor was wrong about the factual basis for his strike does not equate to a finding that the prosecutor has lied about his reason for exercising the strike to cover up the fact that his genuine motivating factor was race. *Rice*, 546 U.S. at 338; *see also Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996)("Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for

some action.")(internal quotations and citations omitted).

The prosecutor testified as to his reasons for striking the African-Americans. These reasons are set forth and discussed in the trial court's Order, (doc. 28, Tab 27 at 44-49), the opinion of the Alabama Court of Criminal Appeals, *Adkins*, 639 So. 2d at 517-20, and the Report and Recommendation, (doc. 26 at 57-78.) Also, the trial court found that the prosecutor had "never intentionally misrepresented any fact to this court to gain an advantage in a criminal proceeding," and that he had actually "admitted facts which were to the detriment of his cases" on many occasions.[16] (Vol. 8, Tab 27 at 48.) The Alabama Court of Criminal Appeals specifically stated that "the St. Clair County District Attorney's

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[16] Adkins argues that 2 the trial court "could not use his personal experience or relationship with the District Attorney outside of the context of this case to determine whether the prosecutor intended to discriminate in striking nine of the eleven black prospective jurors." (Doc. 28 at 9.) The Supreme Court has held, "The case for discrimination goes beyond . . . comparisons [of the jurors] to include broader patterns of practice during the jury selection." *Miller-El v. Dretke*, 545 U.S. 231, 253 (2005). Evidence of historical practices designed to reduce or eliminate minorities in the venire can be considered by the trial court when deciding the issue of the prosecutor's credibility. *Id*. (In addition to the side-by-side comparison of the jurors, the Court considered the "prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences," and "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected.").

office does not have a history of discriminatory striking." *Adkins*, 639 So. 2d at 518. Adkins has presented nothing to rebut these findings or to otherwise show the state court's assessment of the prosecutor's history was unreasonable.

Although the evidence does not compel a finding that the prosecutor exercised his peremptory strikes without any racial motivation and reasonable minds might differ, the evidence in the record is legally sufficient to support the trial court's finding of no *Batson* violation. This court finds that Adkins has not demonstrated "clear and convincing evidence" that the trial court's finding – that the prosecutor did not strike these jurors because of their race – is unreasonable in light of the evidence presented to the trial court. Adkins's objections to the Magistrate Judge's Report and Recommendation are overruled.

B. PETITIONER WAS DENIED A FAIR AND IMPARTIAL JUDGE DUE TO JUDICIAL CONFLICT OF INTEREST AND THE APPEARANCE OF IMPROPRIETY.

Adkins argues that the Magistrate Judge erred in holding, "There is no Supreme Court decision clearly establishing that an appearance of bias or partiality, where there is no actual bias, violates the Due Process Clause or any other constitutional provision." (Doc. 28 at 24- 25 [quoting doc. 28 at 94].) Moreover, he argues, "Because it is well-established as a matter of Supreme Court jurisprudence that proof of actual bias is not required to establish a due

process violation where an objective inquiry establishes a 'serious appearance of impropriety' or a 'probability of bias' on the part of a judge, Mr. Adkins objects to the Magistrate Judge's failure to address and analyze his claim by applying the appropriate constitutional standard." (*Id*. at 25.)

Adkins alleges that he was denied his constitutional rights to fair proceedings, due process, and a neutral and impartial judicial officer because the trial judge had a "personal and political interest in winning the election for circuit judge[,] which took place just two weeks after trial[, that] made it impossible for him to give, or appear to give, fair and impartial consideration to the issues presented to him for ruling before and during Mr. Adkins's trial." (Doc. 1 ¶ 81.) The Magistrate Judge held:

> There is no Supreme Court decision clearly establishing that an appearance of bias or partiality, where there is no actual bias, violates the Due Process Clause or any other constitutional provision. Further, there is no United State Supreme Court precedent clearly establishing that campaigning for a judicial office may give rise to actual bias in a criminal case which would violate Adkins'[s] due process rights. There is no evidence that counsel for Adkins was involved in a running controversy with Judge Austin. Neither defense counsel nor the judge made personal attacks against the other. There is no evidence in the record that Judge Austin's attitude or

> demeanor toward the defense was either inappropriate or hostile. Judge Austin's campaigning for election while presiding over Adkins'[s] capital case did not violate Adkins'[s] right to due process.
>
> The denial of Adkins'[s] claim of judicial bias was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court nor were the decisions based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Adkins is not entitled to habeas relief on this claim.

(Doc. 28 at 94.) The Alabama Court of Criminal Appeals has rejected Adkins's argument. *See Adkins v. State*, 600 So. 2d 1054, 1062-63 (Ala. Cr. App. 1990).

The court addresses this objection because Adkins is correct that he does not have to establish actual bias to establish a constitutional violation based on a trial judge's failure to recuse. (Doc. 28 at 25-28 [citing, *inter alia*, *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252, 2263 (2009)].)[17]

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[17] The Court in *Caperton* held:

> "[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See *Tumey* [*v. Ohio*], 273 U.S. [510,] 532, 47 S. Ct. 437 [(1927)]; *Mayberry* [*v. Pennsylvania*,] 400 U.S. [455,] 465-66, 91 S. Ct. 499 [(1971)];[*Aetna Life Ins. Co.*

However, the exceptions to the rule requiring a showing of actual bias are very limited and do not apply to Adkins's claims. *See Caperton*, 129 S. Ct. at 2263-64 (Court found due process violation, without finding actual bias, when "there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975)("In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.")(internal citations and footnotes omitted).

Adkins complains about bias, or the appearance of bias, arising from the fact that the trial judge was

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> *v.*] *Lavoie*, 475 U.S. [813,] at 825, 106 S. Ct. 1580 [(1986)]. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow* [*v. Larkin*], 421 U.S. [35,] 47, 95 S. Ct. 1456 [(1975)].

involved in an election campaign during his trial; he argues, "[T]he close temporal relationship between the imminent judicial election and Judge Austin's abrupt assignment to a highly publicized case in which he had no prior involvement gives rise, at a minimum, to an appearance of impropriety." (Doc. 28 at 37.)

In addressing this issue, the Alabama Court of Criminal Appeals held:

> The appellant next argues that the trial judge erred in failing to recuse himself from the proceedings. Prior to the trial in the instant case the presiding circuit judge of St. Clair County appointed Judge Robert Austin, a district judge, to try this case. Appellant contended at trial that this appointment, provided for by Rule 13 of the Alabama Rules of Judicial Administration, violated the Alabama Constitution. He also argued that Judge Austin should have recused himself since he was at the time campaigning for a seat on the circuit court. We do not agree.
>
> Rule 13(A), Rules of Judicial Administration, states: "The presiding circuit judge may temporarily assign circuit or district court judges to serve either within the circuit or in district courts within the circuit." Our Supreme Court has upheld the constitutionality of this Rule. *See State ex rel. Locke v. Sweeney*, 349 So. 2d 1147 (Ala. 1977).

As our Supreme Court stated in that case, the only limitation on rulemaking allowed under the Judicial Article is that rules " 'shall not abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts . . .' or venue, or jury trial." *Sweeney*, 349 So. 2d at 1148 (quoting amend. 328, § 6.11, Ala. Const. 1901). The temporary assignment of a district judge to the circuit court of the same county in no way violates this limitation. *See Sweeney*, *id*.

The appellant also argues that Judge Austin should have recused himself from the case since the election for the circuit judge position for which he was temporarily appointed was several weeks away and that fact, the appellant argues, could have affected the way he conducted the trial in the instant case.

When arguing in support of the motion, Mr. Barrett stated:

> "Of most concern, Your Honor, is in the unlikely event that a jury should convict Mr. Adkins of the crime of capital murder, and pass a recommendation of life in prison without parole, His Honor may be called upon-in a sentencing hearing to pass upon the jury's recommendation, either to accept it or reject it and impose the electric chair on Mr. Adkins."

Canon 3C, Alabama Canons of Judicial Ethics, states:

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > "(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it."

As this court restated in *McMurphy v. State*, 455 So. 2d 924 (Ala. Cr. App. 1984): "The general rule in Alabama is that there is a presumption that a judge is qualified and unbiased and a person who alleges otherwise has the burden of proving that grounds for his allegation." *McMurphy*, 455 So. 2d at 929. A reasonable man standard is used when evaluating whether a judge should recuse himself from a certain case. *See United States v. Holland*, 655 F.2d 44 (5th Cir. 1981). "[A]

judge should disqualify himself '[w]here he has a personal bias or prejudice concerning a party . . . .' The general rule is that bias sufficient to disqualify a judge must stem from an extrajudicial source." *Holland*, 655 F.2d at 47. Review on appeal of a motion for recusal will not be reversed unless clear evidence of bias is shown. *See Slinker v. State*, 344 So. 2d 1264, 1268 (Ala. Cr. App. 1977).

As the United States Supreme Court stated in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820, 106 S. Ct. 1580, 1585, 89 L. Ed. 2d 823 (1986): "'The law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.'"

After a review of the record, we see no indication that the appellant was prejudiced in any way by Judge Austin's presiding over the trial. It would be unreasonable to hold that Judge Austin should have recused himself. This would imply that every time a judge was up for reelection or election to a different judgeship he would have to recuse himself from any publicized case directly prior to the election. To hold so here "would lead to judicial abandonment of responsibility for the purity of the judicial process and ultimately undermine the independence and integrity of the courts." *United States v. Alabama*, 582 F. Supp. 1197,

> 1208 (N.D. Ala. 1984), *aff'd*, 762 F.2d 1021 (11th Cir. 1985). Judge Austin committed no error in failing to recuse himself from this case.
>
> The appellant also argued that since the trial judge denied his motion for a continuance he has shown his bias in this case. Adverse rulings are not, standing alone, sufficient to show that a judge is biased or prejudiced and should have recused himself. *See Banks v. Corte*, 521 So. 2d 960, 962 (Ala. 1988), *Matter of Sheffield*, 465 So. 2d 350, 357 (Ala. 1984).

Adkins v. State, 600 So. 2d at 1061-63.

The Supreme Court has never held that a judge, running for reelection or election to a new seat, must recuse from high profile cases or refrain from political speech or activity. Indeed, the Supreme Court has held, in dicta, that the Due Process Clause is not violated when "a judge [sits on] a case in which ruling one way rather than another increases his prospects for reelection [of election to another seat]." *Republican Party of Minnesota v. White*, 536 U.S. 765, 782-83 (2002)(internal citations omitted).

The court finds that the decision of the Alabama state court – that the trial judge committed no error in failing to recuse – is a reasonable determination of the facts in light of the record evidence. Moreover, the court finds that the state court's decision is not contrary to nor does it involve an unreasonable application of clearly established Federal law as

determined by the Supreme Court. Adkins's Objections are overruled.

C. OTHER GROUNDS

After careful consideration of the record in this case, the Magistrate Judge's Report and Recommendation, and Adkins's Objections thereto, the court finds no grounds for disturbing the Report and Recommendation as to Adkins's remaining issues.

CONCLUSION

Based on the foregoing, the court hereby adopts the Report and accepts the recommendations of the Magistrate Judge that the petition for writ of habeas corpus be denied. A separate Final Judgment will be entered contemporaneously herewith.

DONE, this 30th day of March, 2010.

s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE

Court of Criminal Appeals of Alabama

Ricky Dale ADKINS

v.

STATE

7 Div. 146

March 5, 1993

As Corrected on Denial of Rehearing May 28, 1993

ON RETURN TO REMAND

TAYLOR, Judge.

The appellant, Ricky Dale Adkins, was convicted of three counts of murder, made capital because the murder occurred during the course of a rape, a robbery, and a kidnapping. Sections 13A-5-40(a)(1), (a)(2), and (a)(3), Code of Alabama 1975. He was sentenced to death by electrocution.

We affirmed the appellant's conviction in *Adkins v. State,* 600 So.2d 1054 (Ala.Cr.App.1990). Between the time of our affirmance and the Alabama Supreme Court's decision in this case, *Ex parte Adkins,* 600 So.2d 1067 (Ala.1992), the United States Supreme Court in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), expanded the holding of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to white defendants. The

appellant in this case is a white male; following *Powers,* the Alabama Supreme Court remanded this case so that a *Batson* hearing could be held. We then remanded this cause to the Circuit Court for St. Clair County. *Adkins v. State,* 600 So.2d 1072 (Ala.Cr.App.1992). That court held a *Batson* hearing and has filed its findings with this court.

The trial court's findings show that the state struck 9 of the 11 black prospective jurors on the venire. One black ultimately sat on the jury. The court found that a prima facie showing of discrimination had been made and it held a hearing at which the prosecutor gave the following reasons for striking the 9 black prospective jurors:

> **Prospective juror number 59**-This juror was struck because he came forward and asked that he be excused from serving on the jury. He was 61 years old and had ulcers.
>
> **Prospective juror number 39**-This juror was struck because he answered during the voir dire that he knew about the case and because he was also *single.*
>
> **Prospective juror number 8**-This juror was struck because she stated that she knew about the case. The prosecutor also had information that she was married to or lived with an individual he had prosecuted.
>
> **Prospective juror number 52**-This juror was struck because of his age and because he was

single. He also appeared inattentive and seemed disinterested during voir dire.

Prospective juror number 36-This juror was struck because she was 53 and *single*. She was also unemployed and asked to be excused from serving on the jury because she had high blood pressure.

Prospective juror number 31-This juror was struck because she was *single* and because she was known to associate with a former local chief of police who had been forced to resign.

Prospective juror number 56-This juror was struck because he was 86 years old and because he indicated that he knew defense counsel.

Prospective juror number 14-This juror was struck because she was *single* and because she worked for the Department of Human Resources (DHR) and the district attorney's office had frequent dealings with her in her capacity as a DHR employee.

Prospective juror number 60-This juror was struck because her father had a federal conviction for a drug-related crime.

After a careful review of the reasons given by the prosecutor and after examining the testimony taken at the *Batson* hearing, we find that no *Batson* violation occurred here.

Initially we observe that the St. Clair County District Attorney's office does not have a history of discriminatory striking. The primary reason given for striking 5 of the 9 black prospective jurors was because the jurors were single. As the court stated in its findings:

> "The District Attorney stated that it was their goal in jury selection to have jurors who were married. The primary defense of the defendant to the capital murder charges was that the defendant did not rape the victim. . . . It was the contention of the defendant that he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him several times during the day. It was the position of the District Attorney that married jurors were preferable to single jurors."

Striking a prospective juror because of his or her marital status may be a sufficiently race-neutral reason if the juror's marital status is related to the case. In this case all the jurors except one were married. The prosecutor also stated at the *Batson* hearing that when he struck the jury he believed that the one unmarried juror was married.

> "Under the facts of the present case being single was a valid reasons for striking the prospective juror, especially when the state has 'struck non-black jurors for substantially the same reason. Such evidence of neutrality may overcome the

presumption of discrimination.' "

Kelley v. State, 602 So.2d 473, 476 (Ala.Cr.App.1992), quoting *Bedford v. State,* 548 So.2d 1097, 1098 (Ala.Cr.App.1989). See also *Carrington v. State,* 608 So.2d 447 (Ala.Cr.App.1992); *Mathews v. State,* 534 So.2d 1129 (Ala.Cr.App.1988).

The reason for striking prospective juror number 59 was also race-neutral. He asked to be excused, stating that he had health problems. "A veniremember's indication that the member might have problems being on the jury in the case is . . . a race-neutral reason for removing that person from the venire." *Kelley,* 602 So.2d at 476. See also *Jackson v. State,* 640 So.2d 1025 (Ala.Cr.App.1992); *Gaston v. State,* 581 So.2d 548 (Ala.Cr.App.1991); *McGahee v. State,* 554 So.2d 454 (Ala.Cr.App.), aff'd, 554 So.2d 473 (Ala.1989).

The primary reason given for striking juror number 56 was also race neutral and therefore did not violate the principles of *Batson.* The fact that a prospective juror knew one of the lawyers involved in the case is a race-neutral reason for striking that juror. *Strong v. State,* 538 So.2d 815 (Ala.Cr.App.1988).

The reason given for striking prospective jurors number 8 and 60 was also race neutral. "The fact that a family member of the prospective juror has been prosecuted for a crime is a valid race-neutral reason." *Yelder v. State,* 596 So.2d 596, 598 (Ala.Cr.App.1991). See also *Powell v. State,* 548

So.2d 590 (Ala.Cr.App.1988), aff'd, 548 So.2d 605 (Ala.1989). A juror's association with a known criminal is also a valid race-neutral reason for striking a prospective juror. *Bedford v. State,* 548 So.2d 1097 (Ala.Cr.App.1989).

Although the prosecution's information indicated that prospective juror number 60's father had served time in a federal penitentiary, she did not provide that answer on voir dire. However, the court went to great lengths to determine where the prosecutor had gotten his information before striking both jurors number 8 and 60. The record reflects that all of the notes made by the prosecutor during the voir dire selection were received into evidence at the *Batson* hearing and were available to defense counsel. The prosecutor further stated that it was his practice to pass around the jury lists to law enforcement officers so that they could make notes about the jurors. The prosecutor also stated during the hearing that he discovered prospective juror number 60's maiden name and knew that her father had been in federal prison. This is also indicated on his notes made during the voir dire of the prospective jurors, where the prosecutor named the individuals who supplied him with this information. We do not have a situation here where the trial court took at face value the reasons given by the prosecutor. *Ex parte Thomas,* 601 So.2d 56 (Ala.1992). The trial court in this case was aware of *Thomas* and went to great lengths to determine the motive behind each strike. The court extensively questioned the prosecutor at the *Batson* hearing. We find this case distinguishable

from *Williams v. State,* 620 So.2d 82 (Ala.Cr.App.1992), where this court reversed the trial court' judgment on a *Batson* violation because the only reason given for striking one of the jurors was that the district attorney "knew this juror through his drug work." We find this case similar to the recent cases of *Naismith v. State,* 615 So.2d 1323 (Ala.Cr.App.1993), and *Jones v. State,* 611 So.2d 466 (Ala.Cr.App.1992). Judge Bowen stated the following in *Naismith:*

> "Here, the information from the police department was that the particular veniremember had either been *arrested or convicted,* so that the information obtained from the police department is not susceptible to the same objection as that obtained in *Walker* [*v. State,* 611 So.2d 1133 (Ala.Cr.App.1992)]. . . .
>
> "In *Jones v. State,* 611 So.2d 466 (Ala.Cr.App.1992), this Court addressed a factual situation very similar to that presented here and held that '[u]nder the circumstances presented here, the prosecutor's strike of veniremember # 4 on the ground that the sheriff's department had had "drug problems" with that person was racially-neutral.'
>
> " 'Our holding in *Walker* does not apply here because in this case the prosecutor had information from the sheriff's department concerning the basis for each peremptory strike and because the prosecutor did not "simply

presume, without further questioning to 'dispel any doubt,' that a veniremember who is under oath, did not answer a question truthfully merely because the prosecutor has hearsay evidence to the contrary." *Walker,* supra.

" 'Here, the prosecutor did not exercise a "same name" strike. There is no indication that the sheriff's department was having drug problems with someone named "Carter" as opposed to this particular veniremember. Here, there was more than the "mere suspicion" of relationship. See *Ex parte Bird,* 594 So.2d 676, 683 (Ala.1991). See also *Walker,* supra ("A 'prosecutor's self-imposed ignorance [should not] preclude a *Batson* claim.' " *Id.* quoting, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection,* 74 Va.L.Rev. 811, 827 (1988)). *Compare Smith v. State,* 590 So.2d 388, 390 (Ala.Cr.App.1991) (wherein the court, in holding that the defendant may not cross-examine jurors or go behind the prosecutor's information to determine if such information was true, stated that a "prosecutor may strike from mistake, as long as the assumptions involved are based on an honest belief and are racially neutral").'

"*Jones,* supra." 611 So.2d at 470.

As this court stated in *Christianson v. State,* 601 So.2d 512, 516 (Ala.Cr.App.1992), quoting *Scales v. State,* 539 So.2d 1074, 1075 (Ala.1988):

> " 'We appreciate that it is impossible to know what is in the mind of another person, and that it is possible that, in stating his reasons for striking a member of the venire, a prosecutor may give a reason that is not the true reason, but we are convinced that the trial judges in our system are in a much better position than appellate judges to decide whether the truth has been stated.' "

At the *Batson* hearing, the defense presented one of the jurors who testified that the prosecution's information concerning her was incorrect. As this court has stated:

> " 'Neither *Batson* nor [*Ex parte*] *Branch* [, 526 So.2d 609 (Ala.1987),] mandates that a defendant be given the opportunity to cross-examine jurors or other witnesses in order to establish that the State's reasons are based on sham or pretext. . . . *Branch* does not encompass the cross-examination of jurors or allow a defendant to go behind a prosecutor's information to determine if such information was true.' "

Jackson v. State, 593 So.2d 167, 171-72 (Ala.Cr.App.1991), quoting *Smith v. State,* 590 So.2d 388, 390 (Ala.Cr.App.1991). The prosecutor's strike based on a mistaken belief did not violate *Batson.* "A prosecutor may strike from mistake, as long as the assumptions involved are based on an honest belief and are racially neutral." *Smith v. State,* 590 So.2d 388, 390 (Ala.Cr.App.1991).

This court will not reverse a trial court's decision

on a *Batson* violation unless that decision is "clearly erroneous." *Gaston,* supra. We do not find the trial court's decision here clearly erroneous.

For the foregoing reasons, the circuit court's judgment in this cause is due to be affirmed.

AFFIRMED.

All the Judges concur except BOWEN, P.J., dissents with opinion.

BOWEN, Presiding Judge, dissenting.

The majority states that prospective juror number 39 was struck because he "answered during the voir dire that he knew about the case and because he was also single." Juror number 39 did indicate that he "knew about the case," but so did 53 other veniremembers out of a total of 60 prospective jurors, [FN1] at least 11 of whom served on the jury,[FN2] and 10 of whom were white.[FN3]

> FN1. The trial court posed the following question to all 60 potential jurors, who had been divided into three panels of 20 jurors each:
>
> "[I]s there anyone who has *not* heard [or] read anything on the television, in the

> newspapers, radio, discussions with other people, is there anyone who has *not* heard anything about the facts of this case?" R. 204, 245-46, 281 (emphasis added).
>
> On Panel 1, sixteen of twenty jurors indicated that they had heard something about the case. R. 204-05. On Panel 2, all twenty jurors indicated that they had some knowledge of the case. R. 246. On Panel 3, eighteen of twenty jurors revealed that they had been exposed to some information about the case. R. 281. Thus, of 60 potential jurors, only 6 did *not* "know about the case."

FN2. Of the twelve jurors and two alternates who actually served on the jury in this case, six had been on Panel 1, six had been on Panel 2, and two had been on Panel 3. Five of the six Panel 1 jurors "knew about the case." R. 333-34, 219-22, 204. All six Panel 2 jurors "knew about the case." R. 333-34, 240-44, 246. The record does not reveal the names of the two Panel 3 members who had heard nothing about the case, see R. 281, so I cannot determine whether those two venirepersons served on the jury. However, assuming that the two Panel 3 jurors who served on the jury were the same two who knew nothing about the case, then a minimum of 11 out of the 14 jurors who actually served here "knew about the case."

> FN3. Only one black juror served in this case. He had been a member of Panel 2 and had, along with every other member of that panel, indicated some prior knowledge of the facts of the case.

It is obvious here that the district attorney engaged in disparate treatment of black veniremembers struck as opposed to white veniremembers possessing the same characteristics.

In addition to the fact that the State failed to strike white jurors "who answer[ed] a question [about their knowledge of the case] in the same or similar manner" as black jurors, *Ex parte Branch,* 526 So.2d 609, 623 (Ala.1987), the explanation that prospective juror number 39 was struck because he was single is contradicted by the actual voir dire, during which the veniremember stated, "My name is [B.M.]. I work for Avondale Mills. *My wife is unemployed.*" R. 243 (emphasis added). An explanation that is refuted, or not borne out, by the juror's statements on voir dire is insufficient to overcome the presumption of racial discrimination. *Ex parte Yelder,* 630 So.2d 107, 110 (Ala.1992) (prosecutor's explanation that he struck veniremember because he " 'couldn't understand a word she said,' [due to] 'the way she put her sentences together' " was belied by veniremember's actual responses on voir dire); *Jackson v. State,* 594 So.2d 1289, 1293-94 (Ala.Cr.App.1991) (prosecutor's explanation that the veniremember was struck "because 'it was shown through voir dire that she

was acquainted with and lived close to an individual' " that the State was attempting to extradite, was discredited by record of voir dire that showed the veniremember knew the individual "only minimally and that her acquaintanceship with him occurred a number of years previous to th[e] trial").

In short, as to the explanation offered as to the perceived bias of juror number 39, i.e., that he was "single," the record affirmatively shows that that explanation has no basis in fact.

Based on the insufficient reasons for striking prospective juror number 39 alone, I think the trial court's determination that the district attorney provided a race-neutral explanation for his strikes of black veniremembers is "clearly erroneous." See *Ex parte Branch,* 526 So.2d at 625. However, I also believe that the explanations given for the strikes of prospective jurors number 56 and 60 were highly suspect.

The assistant district attorney gave the following reason for striking juror number 60:

> "I had done some checking on [this juror] through the town of Margaret where she was from. I found out her maiden name was reported to me to be Hopson. I had had dealings in law enforcement with the Hopson family. It was also reported to me that her father, Mr. Willie Hopson, had either-my notes were not clear-had either been in prison or was in prison at that time on drug related matters in the Federal Prison. I also had information

> available to me through the D.A.'s office involving her husband's family involving criminal activities. I think I asked the jury venire if I had ever prosecuted them or any member of their family. I also asked if they had any family member that had ever been in prison. I don't remember [juror number 60] responding to that. My information was that her father had been." S.R. 14.
>
> . . . .
>
> "I know specifically her father-my information was that I got from the community at that time-her father was Willie Hopson. He had been convicted by the Federal Courts in some drug related matter." S.R. 24.

To the extent that the strike of prospective juror number 60 was based on the district attorney's assessment that the juror displayed a lack of forthrightness by failing to answer the voir dire question about "family member [s] in prison," that assessment was not supported by the record of voir dire. The specific voir dire question was: "[I]s there anyone on the jury panel that has a relative or close friend, presently or in the past, *in the State prison system?*" R. 293 (emphasis added). A reasonable juror with a friend or relative in the *federal* penitentiary could conclude that the question dealt *solely* with the State prison system, as specified, especially since the district attorney inquired further whether the fact that any of the jurors had a relative or friend in the state penal system "would . . . make [them] feel ill

toward the district attorney because possibly people like us are responsible for putting a relative or loved one or friend in prison?" R. 294.

Although prospective juror number 60 was not obligated to answer the specific voir dire question asked, and her failure to speak up did not undermine her credibility, the district attorney would, nevertheless, have been justified in striking the prospective juror based solely upon his hearsay information that the juror's father had served time for a federal offense. See *Heard v. State,* 584 So.2d 556, 560 (Ala.Cr.App.1991). The credibility of that reason, however, was called into question by the fact that the district attorney *failed to strike* at least one [FN4] white veniremember who answered that he had a brother-in-law in prison. R. 293. That veniremember in fact served on the jury. See R. 333-34, 293.

> FN4. Another veniremember, who is ad addressed only as "Ma'am," and whose name and race are not shown by the record of voir dire, answered that she had a son in prison. R. 293-94.

The district attorney stated that he struck prospective juror number 56 because the veniremember was 86 years old, because he "probably could not hear the questions and . . . understand," and because "he acknowledged that he knew [defense counsel] personally." S.R. 12-13. The record supports the district attorney's assessment

that the juror had a hearing problem, but the additional reason, that the juror knew defense counsel, is called into question by the prosecutor's failure to strike a white venireman who also acknowledged that he knew defense counsel. R. 290. That veniremember, who actually served on the jury, was the same juror who answered that he had a brother-in-law in prison. R. 293.

Although the "age" rationale may have been a sufficiently race-neutral reason for striking juror number 60, and the "relative in prison" rationale may have sufficed as a non-discriminatory reason for striking juror number 56, when the record reveals that a white venireman, who was not struck and who in fact served on the jury, shared two characteristics used to justify the strikes of blacks-that he knew defense counsel and that he had a relative in prison-the district attorney's stated reasons for striking black jurors appear to be a sham or pretext.

I appreciate the fact that this case, like *Bui v. State,* 627 So.2d 855 (Ala.Cr.App.1992), was tried before *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); that several years elapsed between the striking of the jury and the time the prosecutor was required to give his reasons for eliminating black jurors; that the defense struck one black person; and that one black person actually served on the jury in this case.

However, I cannot conclude, as the Alabama Supreme Court did in *Bui v. State,* that the State

provided particularly persuasive reasons for most of its strikes or that the trial judge displayed a "preemptive 'sensitivity' " toward the issue of racial discrimination here. See *Bui v. State,* 627 So.2d at 860 (Adams, J., concurring specially). For example, the district attorney informed the trial court at the remand hearing that he had decided, prior to striking the jury, to eliminate single people, S.R. 9, but he did not "articulate how [being single] related to the case at hand or how [a single person] might have been perceived as biased because of [that status]." Instead, it appears that the trial court, in its order on return to remand, dated September 10, 1992, articulated *for* the district attorney how a juror's marital status related to the facts of the case:

> "The District Attorney stated that it was their goal in jury selection to have jurors who were married. The primary defense of the defendant to the capital murder charges was that the defendant did not rape the victim. . . . It was the contention of the defendant that he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him several times during the day. It was the position of the District Attorney that married jurors were preferable to single jurors."

I dissent because I believe the trial court's finding of non-discrimination was clearly erroneous.

IN THE CIRCUIT COURT FOR ST. CLAIR COUNTY, ALABAMA AT PELL CITY, ALABAMA

STATE OF ALABAMA,

vs. CASE NO. CC88-22

RICKY DALE ADKINS,

DEFENDANT

O R D E R

This cause having been remanded by the Supreme Court to this Court for a hearing pursuant to Batson v. Kentucky, 476 U.S. 79(1986), and upon a hearing in this cause the Court required the State of Alabama to demonstrate to the Court, race neutral reasons for striking nine of eleven blacks from the jury.

After considering the testimony at the hearing and an affidavit filed by the District Attorney the Court finds that the following are reasons given by the State for exercising peremptory challenges to black jurors.

The State's 5th strike, Fred D. Woods, had previously requested to be excused from jury service due to ulcers.

The State's 6th strike, Billy J. Morris, was struck because, according to the notation of the State he was single. Although the transcript reflects, at page

243, that Morris' wife is unemployed, the State, in good faith, thought he was single.

The 8th strike for the state was juror Jo Ann Clark. She was single and worked at Alecko's Restaurant. The owner of Aleckos was a individual who had been investigated by law enforcement and had subsequently served time in prison.

The 9th strike for the State was David N. Turner. Turner was single and inattentive during the jury selection process.

The 11th strike for the State was Dorothy V. Moore. She was single and had previously asked to be excused due to high blood pressure.

The 12th strike for the State was Janie M. Martin. She was single. The District Attorney had information that she had dated a former chief of police in St. Clair County who had resigned.

The 14th strike by the State was Tobe Williams. He was 86 years old and single, his wife was deceased. He knew Talmadge Fambrough one of the attorneys for the defendant. Williams had also failed to acknowledge that he had previously been employed by Van Davis, the District Attorney, which failure the District Attorney attributed to his advanced age and lack of hearing and memory.

The 17th strike by the State was Linda Davis. She was single and employed by the St. Clair Department of Human Resources. The District

Attorney's office had previously had some less than satisfactory dealings with Ms. Davis in that capacity.

The 18th strike by the State was Dorothy H. Woody. Her maiden name was Hopson and the District Attorney had prior dealings with her family. Her father, Willie Hopson, either was serving time in prison or had served time in prison.

The Court recognizes that the explanations of the State for strike blacks from the jury venire should be more than mere "window dressing." It is incumbent upon the Court to satisfy itself that the reasons given are legitimate.

The major reason for excluding those blacks who did not serve was the fact that they were single. The District Attorney stated that it was their goal in jury selection to have jurors who were married. The primary defense of the defendant to the capital murder charges was that the defendant did not rape the victim, Mrs. Hamilton. It was the contention of the defendant that he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him several times during the day. It was the position of the District Attorney that married jurors were preferable to single jurors.

In examining the validity of the State's reasons in order to determine whether they are race neutral, or a mere sham, the Court should look at those who were seated on the jury to determine whether any

non-minority jurors seated, possessed any of the characteristics for which the minority jurors were supposedly excluded. Of the twelve jurors seated (and the two alternates as well) all were married, except one. The one exception however was Daris Jorden, who, although was single, was also black.

The District Attorney stated that Jorden was not struck because he had gone to school with one of the assistant district attorneys and, he had previously served on one of the grand juries presided over by the District Attorney.

Of the nine black jurors struck, six were not married. (Jo Ann Clark, David Turner, Dorothy Moore, Janie Martin, Tobe Williams, and Linda Davis).

Marital status is a race neutral reason for striking jurors. Dill vs. State, 600 So.2d 343 (Ala. Cr. App. 1991). Of the four single white jurors on the venire, three (David Poe, Milford Simmons and John Willingham) were struck by the defendant. No single white jurors served on the jury panel.

Of the three married black jurors who were struck by the State, Fred Woods was struck due to his stated problem with ulcers and Dorothy Woody was struck based upon criminal history of a family member. Both of these reasons the Court finds, under the circumstances, to be race neutral.

The remaining struck black juror was Billy Morris. Morris was struck, not because he was

single, rather because it was the belief and conviction of the two District Attorneys that he was single. This belief, from the record, is apparently mistaken.

The issue becomes whether a mistaken belief by the prosecutor as to the marital status of a prospective juror is a race neutral reason for striking a black juror? This Court views that issue from the context of the entire proceedings.

At the Batson hearing both District Attorney Davis of St. Clair County and District Attorney Campbell of Shelby County were present. Even as of the date of the hearing both were of the belief that Billy Morris was single and stated that his marital status was the primary reason he was struck.

This Court having worked with District Attorney Davis on many other cases in the past, finds that he has never intentionally misrepresented any fact to this Court to gain an advantage in a criminal proceeding. He has many times admitted facts which were to the detriment of his cases and accepted the consequences of facts that were against his case. This Court has never found District Attorney Davis to purposefully exclude blacks from juries in cases prosecuted by him. The Court finds his statement as to mistaken belief as to the marital status of jury Morris to be credible.

In Dill vs. State, supra at 354, the issue of just such a mistake by the prosecution in jury selection was discussed by the Supreme Court. In that case

the trial Court was satisfied, based on the evidence and other surrounding circumstances, that the prosecutor had made a mistake in allowing a single white juror to remain on the jury panel when blacks were struck for the same reason. The Court held that this was not evidence of racial discrimination.

After reviewing those jurors struck by the State and the explanations given, this Court finds that there was no purposeful racial discrimination in the peremptory strikes exercised by the State as to Billy Morris, or any other black juror struck.

It is ORDERED that the Clerk of this Court forward a copy of this order with the findings herein to the Court of Criminal Appeals pursuant to their order on remand. It is further ordered that a transcript of the hearing upon which this order is based be forwarded to the Court of Criminal Appeals.

DONE AND ORDERED this the 10th day of September, 1992 at Pell City, Alabama

s/ Robert E. Austin

Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12380

RICKY D. ADKINS,

Petitioner - Appellant,

versus

WARDEN, HOLMAN CF,
COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, BARKETT and MARTIN, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

ORD-42

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

RICKY DALE ADKINS,	)	
Petitioner,	)	
vs.	)	**CASE NO. 4:06-CV-4666-SLB**
GRANT CULLIVER, Warden; RICHARD F. ALLEN, Commissioner, Alabama Department of Corrections,	)	
Respondents.	)	

REPORT AND RECOMMENDATION

. . .

I. THE STATE UNCONSTITUTIONALLY EXERCISED ITS PEREMPTORY CHALLENGES BY STRIKING AFRICAN AMERICAN JURORS ON THE BASIS OF THEIR RACE

Adkins argues that the prosecution used nine of its strikes to remove 82% of the African Americans from the jury venire. There were 64 jurors qualified for service, and eleven of those jurors were African

Americans.[18/] The defense struck one African American. Only one African American juror served on the trial jury.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory strikes based solely on race and established a three-step process for evaluating those claims.[19/]

In *Batson*, the Court said that the defendant could establish a *prima facie* showing in the following manner:

[18/] The State and defense each had 24 strikes. The qualified venire was comprised of 17% African Americans. The State exercised 9 of its 24 strikes – 37.5% of its strikes – to remove African Americans from the venire. The State left 18% of the African Americans on the venire. The State exercised 15 of its 24 strikes – 62.5% of its strikes – to remove 28% of the whites from the qualified venire. Fourteen people served on the trial jury – twelve jurors and two alternates. The jury panel selected was comprised of 13 whites and 1 African American. The jury was thus comprised of 7% African Americans.

[19/] The *Batson* decision applies to cases challenging convictions that became final after the Supreme Court's opinion was announced on April 30, 1986. *Allen v. Hardy*, 478 U.S. 255 (1986). Adkins' conviction became final in 1994 when the United States Supreme Court denied the petition for writ of certiorari. Vol. 36, R-81. Therefore, *Batson* is applicable to this case.

[T]he defendant first must show that he is a member of a cognizable racial group [citation omitted] and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [Citation omitted.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

. . .

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. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges

> creates a *prima facie* case of discrimination against black jurors.

476 U.S. at 96-97.

The *Batson* Court explained the second step:

> 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. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. . . . But the prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption-or his intuitive judgment--hat they would be partial to the defendant because of their shared race. . . . The prosecutor [] must articulate a neutral explanation related to the particular case to be tried.

476 U.S. at 97-98.

If the prosecutor's explanation is facially valid, the reason given will be deemed race neutral. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed 2d 834 (1995).

At the third step, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. In making this determination, the court must evaluate "'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 974, 163 L.Ed.2d 824 (2006), quoting from *Purkett*, *supra*, at 768. A trial judge's finding regarding discrimination in the *Batson* context is a finding of fact based on credibility determinations and, as such, is entitled to great deference by a reviewing court. *Batson*, 476 U.S. at 98, fn. 21.

In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) the Supreme Court extended *Batson*, holding that under the Equal Protection Clause, a defendant has standing to object to race-based exclusion of jurors through peremptory challenges whether or not the defendant and excluded jurors share the same race. Adkins, who is white, complains only of the strikes against African American jurors. When this case was tried in 1988, *Powers* had not been decided; however, by the time the Supreme Court remanded the case for a *Batson* hearing on petition for writ of certiorari during the direct appeal process (Vol. 36, R-75), *Powers* had been decided.

Adkins' *Batson* claim was raised for the first time in the petition for writ of certiorari from the affirmance on direct appeal (Vol. 10, R-33). The Alabama Supreme Court concluded that it was necessary to remand the case to the circuit court for hearing on the *Batson* issue:

> Adkins, a white defendant, was charged with the murder of a white female. During jury selection, the State exercised 9 of its 24 peremptory strikes to remove 9 of 11 blacks from the jury. Adkins's lawyers struck one of the two remaining black jurors, and one black served on the jury. Adkins's lawyers never objected to the State's removal of blacks from Adkins's jury.
>
> Recently, the United States Supreme Court held as follows:
>
> "Invoking the Equal Protection Clause and federal statutory law, and relying upon well-established principles of standing, we hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race."
>
> *Powers v. Ohio*, 499 U.S. 400, ----, 111 S.Ct. 1364, 1366, 113 L.Ed.2d 411, 419 (1991). The Court stated:

"The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. . . . This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' . . . and places the fairness of a criminal proceeding in doubt." *Id.*, 499 U.S. at ____, 111 S.Ct. at 1371, 113 L.Ed.2d at 425 (citations omitted). Consequently, this Court must review the question whether the State's exercise of its peremptory strikes was racially discriminatory.

In *Ex parte Bankhead, supra*, this Court, relying on *Powers*, remanded a case in which the death penalty had been imposed on a white defendant. Bankhead's attorney had not objected to the State's use of its peremptory strikes to remove 8 of 10 black venire members. This Court held that the "plain error" doctrine required it to address the *Batson* issue and, on rehearing after *Powers* was decided and relying on the mandate of *Powers*, held that the case was due to be remanded to the circuit court for a hearing on

> this issue. 585 So.2d at 117. The same holding is required here.

Ex parte Adkins, 600 So.2d 1067, 1069 (Ala. 1992). In accordance with the direction of the Alabama Supreme Court, the Alabama Court of Criminal Appeals remanded the case to the trial court for a *Batson* hearing. *Adkins v. State*, 600 So.2d 1072 (Ala. Crim. App. 1992).

The *Batson* hearing was conducted on July 29, 1992, and the hearing transcript was certified and filed on September 11, 1992. In an order dated September 9, 1992, the circuit judge stated:

> The Court, upon reviewing the transcript in this cause notes that at page 243 the following occurred in connection with juror Billy Morris:
>
> "Prospective Juror Billy Morris: my name is Billy Morris. I work for Avondale Mills. My wife is unemployed."
>
> The District Attorney is asked to supplement the record of the *Batson* hearing by affidavit or otherwise with that explanation, if any, as to the District Attorney's contention that Billy Morris was a single man.

Vol. 8, R-27, p. 43.

On September 9, 1992, the same date as the court order, Van Davis, one of the prosecutors, stated in an affidavit:

> Mike Campbell and myself were at all times under the impression and understood that Mr. Billy Morris was a single male and he was struck by the state for that reason. We did not learn until long after the trial and upon reading the transcript that Billy Morris was in fact married and his spouse unemployed. The notes which we prepared in preparation for the *Batson* Hearing also reflected that Billy Morris was single and no where in our notes taken during this jury selection process is it noted that Billy Morris was a married man.

Vol. 8, R-27, p. 41.

In an order entered September 10, 1992, the circuit judge stated:

> This cause having been remanded by the Supreme Court to this Court for a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and upon a hearing in this cause the Court required the State of Alabama to demonstrate to the Court, race neutral reasons for striking nine of eleven blacks from the jury.
>
> After considering the testimony at the hearing and an affidavit filed by the District Attorney the Court finds that the following are reasons given by the State for exercising peremptory challenges to black jurors.

The State's 5th strike, Fred D. Woods, had previously requested to be excused from jury services due to ulcers.

The State's 6th strike, Billy J. Morris, was struck because, according to the notation of the State he was single. Although the transcript reflects, at page 243, that Morris' wife is unemployed, the State, in good faith, thought he was single.

The 8 strike for the State was juror Jo Ann Clark. She was single and worked at Alecko's Restaurant. The owner of Aleckos [sic] was an individual who had been investigated by law enforcement and had subsequently served time in prison.

The 9th strike for the State was David N. Turner. Turner was single and inattentive during the jury selection process.

The 11th strike for the State was Dorothy V. Moorer. She was single and had previously asked to be excused due to high blood pressure.

The 12th strike for the State was Janie M. Martin. She was single. The District Attorney had information that she had dated a former chief of police in St. Clair County who had resigned.

The 14th strike by the State was Tobe Williams. He was 86 years old and single, his wife was deceased. He knew Talmadge Fambrough one of the attorneys for the defendant. Williams also failed to acknowledge that he had previously been employed by Van Davis, the District Attorney, which failure the District Attorney attributed to his advanced age and lack of hearing and memory.

The 17th strike by the State was Linda Davis. She was single and employed by the St. Clair Department of Human Resources. The District Attorney's office had previously had some less than satisfactory dealings with Ms. Davis in that capacity.

The 18th strike by the State was Dorothy H. Woody. Her maiden name was Hopson and the District Attorney had prior dealings with her family. Her father, Willie Hopson, either was serving time in prison or had served time in prison.

The Court recognizes that the explanations of the State for striking blacks from the jury venire should be more than mere "window dressing." It is incumbent upon the Court to satisfy itself that the reasons given are legitimate.

The major reason for excluding those blacks who did not serve was the fact that they were single. The District Attorney stated

that it was their goal in jury selection to have jurors who were married. The primary defense of the defendant to the capital murder charges was that the defendant did not rape the victim, Mrs. Hamilton. It was the contention of the defendant that he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him several times during the day. It was the position of the District Attorney that married jurors were preferable to single jurors.

In examining the validity of the State's reasons in order to determine whether they are race neutral, or a mere sham, the Court should look at those who were seated on the jury to determine whether any non-minority jurors seated, possessed any of the characteristics for which the minority jurors were supposedly excluded. Of the twelve jurors seated (and the two alternates as well) all were married, except one. The one exception however was Daris Jorden, who, although single, was also black.

The District Attorney stated that Jorden was not struck because he had gone to school with one of the assistant district attorneys and he had previously served on one of the grand juries presided over by the District Attorney.

Of the nine black jurors struck, six were not married. (Jo Ann Clark, David Turner, Dorothy Moorer, Janie Martin, Tobe Williams, and Linda Davis).

Marital status is a race neutral reason for striking jurors. *Dill vs. State*, 600 So.2d 343 (Ala. Cr. App. 1991). Of the four single white jurors on the venire, three (David Poe, Milford Simmons, and John Willingham) were struck by the State and one (Martha St. John) was struck by the defendant. No single white jurors served on the jury panel.

Of the three married black jurors who were struck by the State, Fred Woods was struck due to his stated problem with ulcers and Dorothy Woody was struck based upon criminal history of a family member. Both of these reasons the Court finds, under the circumstances, to be race neutral.

The remaining struck black juror was Billy Morris. Morris was struck, not because he was single, rather because it was the belief and conviction of the two District Attorneys that he was single. This belief, from the record, is apparently mistaken.

The issue becomes whether a mistaken belief by the prosecutor as to the marital status of a prospective juror is a race neutral reason for striking a black juror? This Court

views that issue from the context of the entire proceedings.

At the *Batson* hearing both District Attorney Davis of St. Clair County and District Attorney Campbell of Shelby County were present. Even as of the date of the hearing both were of the belief that Billy Morris was single and stated that his marital status was the primary reason he was struck.

This Court having worked with District Attorney Davis on many other cases in the past, finds that he has never intentionally misrepresented any fact to this Court to gain an advantage in a criminal proceeding. He has many times admitted facts which were to the detriment of his cases and accepted the consequences of facts that were against his case. This Court has never found District Attorney Davis to purposefully exclude blacks from juries in cases prosecuted by him. The Court finds his statement as to mistaken belief as to the marital status of jur[or] Morris to be credible.

In *Dill vs. State, supra* at 354, the issue of just such a mistake by the prosecution in jury selection was discussed by the Supreme Court. In that case the trial Court was satisfied, based on the evidence and other surrounding circumstances, that the prosecutor had made a mistake in allowing a single white juror to

> remain on the jury panel when blacks were struck from the same reason. The Court held that this was not evidence of racial discrimination.
>
> After reviewing those jurors struck by the State and the explanations given, this Court finds that there was no purposeful racial discrimination in the peremptory strikes exercised by the State as to Billy Morris, or any other black juror struck.

Vol. 8, pp. 44-49.

On return to remand, the Alabama Court of Criminal Appeals addressed the trial court's findings based on the *Batson* hearing:

> We affirmed the appellant's conviction in *Adkins v. State*, 600 So.2d 1054 (Ala. Cr. App.1990). Between the time of our affirmance and the Alabama Supreme Court's decision in this case, *Ex parte Adkins*, 600 So.2d 1067 (Ala.1992), the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), expanded the holding of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to white defendants. The appellant in this case is a white male; following *Powers*, the Alabama Supreme Court remanded this case so that a *Batson* hearing could be held. We then remanded this cause to the Circuit Court for St. Clair County. *Adkins v. State*, 600 So.2d

1072 (Ala. Cr. App.1992). That court held a *Batson* hearing and has filed its findings with this court.

The trial court's findings show that the state struck 9 of the 11 black prospective jurors on the venire. One black ultimately sat on the jury. The court found that a *prima facie* showing of discrimination had been made and it held a hearing at which the prosecutor gave the following reasons for striking the 9 black prospective jurors:

Prospective juror number 59 [Fred D. Wood] - This juror was struck because he came forward and asked that he be excused from serving on the jury. He was 61 years old and had ulcers.

Prospective juror number 39 [Billy J. Morris] - This juror was struck because he answered during the voir dire that he knew about the case and because he was also single.

Prospective juror number 8 [Jo Ann Clark] - This juror was struck because she stated that she knew about the case. The prosecutor also had information that she was married to or lived with an individual he had prosecuted.

Prospective juror number 52 [David M. Turner] - This juror was struck because of his age and because he was single. He also

appeared inattentive and seemed disinterested during voir dire.

Prospective juror number 36 [Dorothy Moorer] - This juror was struck because she was 53 and single. She was also unemployed and asked to be excused from serving on the jury because she had high blood pressure.

Prospective juror number 31 [Janie M. Martin] - This juror was struck because she was single and because she was known to associate with a former local chief of police who had been forced to resign.

Prospective juror number 56 [Tobe Williams] - This juror was struck because he was 86 years old and because he indicated that he knew defense counsel.

Prospective juror number 14 [Linda Davis] - This juror was struck because she was single and because she worked for the Department of Human Resources (DHR) and the district attorney's office had frequent dealings with her in her capacity as a DHR employee.

Prospective juror number 60 [Dorothy Woody] - This juror was struck because her father had a federal conviction for a drug-related crime.[20/]

[20/] During the *Batson* hearing, the prosecutor identified by both juror number and name the African Americans he struck. Vol. 8, *Batson* Hearing Transcript, TR 8 – 14.

After a careful review of the reasons given by the prosecutor and after examining the testimony taken at the *Batson* hearing, we find that no *Batson* violation occurred here.

Initially we observe that the St. Clair County District Attorney's office does not have a history of discriminatory striking. The primary reason given for striking 5 of the 9 black prospective jurors was because the jurors were single. As the court stated in its findings:

"The District Attorney stated that it was their goal in jury selection to have jurors who were married. The primary defense of the defendant to the capital murder charges was that the defendant did not rape the victim. . . . It was the contention of the defendant that he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him several times during the day. It was the position of the District Attorney that married jurors were preferable to single jurors."

Striking a prospective juror because of his or her marital status may be a sufficiently race-neutral reason if the juror's marital status is related to the case. In this case all the jurors except one were married. The prosecutor also stated at the *Batson* hearing that when he

struck the jury he believed that the one unmarried juror was married.

"Under the facts of the present case being single was a valid reason for striking the prospective juror, especially when the state has 'struck non-black jurors for substantially the same reason. Such evidence of neutrality may overcome the presumption of discrimination.'"

Kelley v. State, 602 So.2d 473, 476 (Ala. Cr. App.1992), quoting *Bedford v. State*, 548 So.2d 1097, 1098 (Ala. Cr. App.1989). See also *Carrington v. State*, 608 So.2d 447 (Ala. Cr. App.1992); *Mathews v. State*, 534 So.2d 1129 (Ala. Cr. App.1988).

The reason for striking prospective juror number 59 [Fred D. Wood] was also race-neutral. He asked to be excused, stating that he had health problems. "A veniremember's indication that the member might have problems being on the jury in the case is . . . a race-neutral reason for removing that person from the venire." *Kelley*, 602 So.2d at 476. See also *Jackson v. State*, 640 So.2d 1025 (Ala. Cr. App.1992); *Gaston v. State*, 581 So.2d 548 (Ala. Cr. App.1991); *McGahee v. State*, 554 So.2d 454 (Ala. Cr. App.), aff'd, 554 So.2d 473 (Ala.1989).

The primary reason given for striking juror number 56 [Tobe Williams] was also race

neutral and therefore did not violate the principles of *Batson*. The fact that a prospective juror knew one of the lawyers involved in the case is a race-neutral reason for striking that juror. *Strong v. State*, 538 So.2d 815 (Ala. Cr. App.1988).

The reason given for striking prospective jurors number 8 [Jo Ann Clark] and 60 [Dorothy Woody] was also race neutral. "The fact that a family member of the prospective juror has been prosecuted for a crime is a valid race-neutral reason." *Yelder v. State*, 596 So.2d 596, 598 (Ala. Cr. App.1991). See also *Powell v. State*, 548 So.2d 590 (Ala. Cr. App.1988), aff'd, 548 So.2d 605 (Ala.1989). A juror's association with a known criminal is also a valid race-neutral reason for striking a prospective juror. *Bedford v. State*, 548 So.2d 1097 (Ala. Cr. App.1989).

Although the prosecution's information indicated that prospective juror number 60's [Dorothy Woody's] father had served time in a federal penitentiary, she did not provide that answer on *voir dire*. However, the court went to great lengths to determine where the prosecutor had gotten his information before striking both jurors number 8 and 60. The record reflects that all of the notes made by the prosecutor during the *voir dire* selection were received into evidence at the *Batson* hearing and were available to defense counsel.

The prosecutor further stated that it was his practice to pass around the jury lists to law enforcement officers so that they could make notes about the jurors. The prosecutor also stated during the hearing that he discovered prospective juror number 60's maiden name and knew that her father had been in federal prison. This is also indicated on his notes made during the *voir dire* of the prospective jurors, where the prosecutor named the individuals who supplied him with this information. We do not have a situation here where the trial court took at face value the reasons given by the prosecutor. *Ex parte Thomas*, 601 So.2d 56 (Ala.1992). The trial court in this case was aware of *Thomas* and went to great lengths to determine the motive behind each strike. The court extensively questioned the prosecutor at the *Batson* hearing. We find this case distinguishable from *Williams v. State*, 620 So.2d 82 (Ala. Cr. App.1992), where this court reversed the trial court's judgment on a *Batson* violation because the only reason given for striking one of the jurors was that the district attorney "knew this juror through his drug work." We find this case similar to the recent cases of *Naismith v. State*, 615 So.2d 1323 (Ala. Cr. App.1993), and *Jones v. State*, 611 So.2d 466 (Ala. Cr. App.1992). Judge Bowen stated the following in *Naismith*:

"Here, the information from the police department was that the particular veniremember had either been arrested or convicted, so that the information obtained from the police department is not susceptible to the same objection as that obtained in *Walker* [*v. State*, 611 So.2d 1133 (Ala. Cr. App.1992)] . . . .

"In *Jones v. State*, 611 So.2d 466 (Ala. Cr. App.1992), this Court addressed a factual situation very similar to that presented here and held that '[u]nder the circumstances presented here, the prosecutor's strike of veniremember #4 on the ground that the sheriff's department had had "drug problems" with that person was racially-neutral.'

"'Our holding in *Walker* does not apply here because in this case the prosecutor had information from the sheriff's department concerning the basis for each peremptory strike and because the prosecutor did not "simply presume, without further questioning to 'dispel any doubt,' that a veniremember who is under oath, did not answer a question truthfully merely because the prosecutor has hearsay evidence to the contrary." *Walker, supra.*

"'Here, the prosecutor did not exercise a "same name" strike. There is no indication that the sheriff's department was having drug

problems with someone named "Carter" as opposed to this particular veniremember. Here, there was more than the "mere suspicion" of relationship. See *Ex parte Bird*, 594 So.2d 676, 683 (Ala.1991). See also *Walker, supra* ("A 'prosecutor's self-imposed ignorance [should not] preclude a *Batson* claim.'" *Id*. quoting, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection*, 74 Va.L.Rev. 811, 827 (1988)). Compare *Smith v. State*, 590 So.2d 388, 390 (Ala. Cr. App.1991) (wherein the court, in holding that the defendant may not cross-examine jurors or go behind the prosecutor's information to determine if such information was true, stated that a "prosecutor may strike from mistake, as long as the assumptions involved are based on an honest belief and are racially neutral").'

"*Jones, supra*."

611 So.2d at 470.

As this court stated in *Christianson v. State*, 601 So.2d 512, 516 (Ala. Cr. App.1992), quoting *Scales v. State*, 539 So.2d 1074, 1075 (Ala.1988):

"'We appreciate that it is impossible to know what is in the mind of another person, and that it is possible that, in stating his reasons for striking a member of the venire, a prosecutor may give a reason that is not the

true reason, but we are convinced that the trial judges in our system are in a much better position than appellate judges to decide whether the truth has been stated.'"

At the *Batson* hearing, the defense presented one of the jurors who testified that the prosecution's information concerning her was incorrect. As this court has stated:

> "'Neither *Batson* nor [*Ex parte*] *Branch* [, 526 So.2d 609 (Ala.1987),] mandates that a defendant be given the opportunity to cross-examine jurors or other witnesses in order to establish that the State's reasons are based on sham or pretext. . . . *Branch* does not encompass the cross-examination of jurors or allow a defendant to go behind a prosecutor's information to determine if such information was true.'"
>
> *Jackson v. State*, 593 So.2d 167, 171-72 (Ala. Cr. App.1991), quoting *Smith v. State*, 590 So.2d 388, 390 (Ala. Cr. App.1991). The prosecutor's strike based on a mistaken belief did not violate *Batson*. "A prosecutor may strike from mistake, as long as the assumptions involved are based on an honest belief and are racially neutral." *Smith v. State*, 590 So.2d 388, 390 (Ala. Cr. App.1991).

> This court will not reverse a trial court's decision on a *Batson* violation unless that decision is "clearly erroneous." *Gaston, supra*. We do not find the trial court's decision here clearly erroneous.

Adkins v. State, 639 So.2d 515, 517-520 (Ala. Crim. App. 1993). The application for rehearing was denied May 28, 1993. *Id.*

On January 21, 1994, without any discussion of the *Batson* claim, the Alabama Supreme Court affirmed the judgment of the Alabama Court of Criminal Appeals affirming the judgment of conviction and sentence of death. *Ex parte Adkins*, 639 So.2d 522 (Ala. 1994). The application for rehearing was denied by the Alabama Supreme Court without opinion on March 11, 1994. *Ex parte Adkins*, 639 So.2d 522 (Ala. 1994), R-43. On October 3, 1994, the United States Supreme Court denied the petition for writ of certiorari to the Supreme Court of Alabama. *Adkins v. Alabama*, 513 U.S. 851, 115 S.Ct. 151, 130 L.Ed.2d 90 (1994).

Based on a review of the *Batson* hearing, the *voir dire* proceedings, the trial court's order following the *Batson* evidentiary hearing, and the decision of the Alabama Court of Criminal Appeals, the Court concludes that the state court's decision was not contrary to nor did it involve an unreasonable application of *Batson* and its progeny. Further, the state court's decision was not based on an unreasonable determination of the facts in light of

the evidence presented in the state court proceedings.

The prosecution struck nine of the eleven African American jurors, members of a cognizable racial group. Adkins was entitled to rely on the fact that the practice of peremptory challenges permits "those to discriminate who are of a mind to discriminate." *Batson, supra.* This "pattern" of strikes against African American jurors was sufficient to give rise to an inference of discriminatory purpose and satisfy the first *Batson* step.

At the hearing, the prosecutor explained his reasons for the strikes of the African American jurors. Those reasons fell within the following categories: jurors whose marital status was single, jurors who had health issues, jurors within petitioner's age bracket, and jurors who had criminal history issues.[21/] Adkins argues that the strikes were discriminatory to the extent that they were based on marital status, age, unemployment, hardship, incorrect information and information about which jurors were not questioned.

[21/] Adkins argues that many of the reasons given for the strikes are not supported by Davis' notes upon which his testimony was based. At the evidentiary hearing, Davis testified that his testimony concerning the strikes was based upon his notes and his memory. Vol. 8, R-27, TR. 24-25.

A. Marital Status and Basis for Strikes

The prosecutor testified at the *Batson* hearing that he struck Morris because he knew about the case and was single. Adkins maintains that the striking of Morris was racially discriminatory because Jimmy Jacks, Jerry Johns and Johnny Montgomery, all of whom were white, also knew about the case but sat on the jury. He also correctly points out that Morris was not single but was married and that Morris stated in *voir dire* that his wife was unemployed. Vol. 1, R-4, TR 243. The prosecutor testified:

> Juror No. 39 would have been the State's 6th strike – Mr. Billy J. Morris, a black male. Among other things, I believe Mr. Morris appeared on Panel No. 2. He was one of the jurors on there that said he knew about the case and had information about the case, as did several of the jurors on that panel. That, coupled with the fact that Mr. Morris was single. I think you will find that with one exception, the State struck all single people.

Vol. 8, R-27, TR 8-9.

While Morris' knowledge of the case played some part in the prosecutor's decision to strike him, it is clear from the transcript that the fact that the prosecutor thought Morris was single played a much larger role in the prosecutor's decision as evidenced

by the prosecutor's assertion that he wanted to strike all single people. The prosecutor was wrong about Morris' marital status.[22/] Prior to entering its order

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[22/] On return to remand, the majority opinion of the Alabama Court of Criminal Appeals had only this to say about the striking of Billy Morris:

> **Prospective juror number 39** - The juror was struck because he answered during the *voir dire* that he knew about the case because he was also *single*.

Adkins v. State, 639 So.2d 515, 517 (Ala. Crim. App. 1993). Curiously, the appellate court made no mention of the fact that the prosecutor was wrong about Morris' marital status.

Judge Bowen dissented, observing:

> In addition to the fact that the State failed to strike white jurors "who answer[ed] a question [about their knowledge of the case] in the same or similar manner" as black jurors, *Ex parte Branch*, 526 So.2d 609, 623 (Ala.1987), the explanation that prospective juror number 39 was struck because he was single is contradicted by the actual *voir dire*, during which the veniremember stated, "My name is [B.M.]. I work for Avondale Mills. My wife is unemployed." R. 243 (emphasis added). An explanation that is refuted, or not borne out, by the juror's statements on voir dire is insufficient to overcome the presumption of racial discrimination. *Ex parte Yelder*, 630 So.2d 107, 110 (Ala.1992) (prosecutor's explanation that he struck veniremember because he "'couldn't understand a word she said,' [due to] 'the way she put her sentences together'" was belied by veniremember's actual responses on *voir dire*); *Jackson v. State*, 594 So.2d 1289, 1293-94 (Ala. Cr. App.1991) (prosecutor's explanation that the veniremember

ruling on the *Batson* issue, the circuit court inquired into the discrepancy, and the prosecutor explained by affidavit that he thought Morris was single and did not learn "until long after the trial and upon reading the transcript that Billy Morris was in fact married." Vol. 8, TR 41. It is unclear whether the prosecutor knew at the time of the *Batson* hearing that Morris was married. Adkins did not question the prosecutor about this error at the evidentiary hearing despite the fact the trial transcript was certified and filed on June 12, 1989, (Vol. 7, p. 1297) and the *Batson* hearing was not conducted until July 29, 1992 (Vol. 8, R-27, TR 1).

> was struck "because 'it was shown through *voir dire* that she was acquainted with and lived close to an individual'" that the State was attempting to extradite, was discredited by record of *voir dire* that showed the veniremember knew the individual "only minimally and that her acquaintanceship with him occurred a number of years previous to th[e] trial").
>
> In short, as to the explanation offered as to the perceived bias of juror number 39, i.e., that he was "single," the record affirmatively shows that that explanation has no basis in fact.
>
> Based on the insufficient reasons for striking prospective juror number 39 alone, I think the trial court's determination that the district attorney provided a race-neutral explanation for his strikes of black veniremembers is "clearly erroneous." See *Ex parte Branch*, 526 So.2d at 625.

Adkins v. State, 639 So.2d 515, 520-521 (Ala. Crim. App. 1993).

In the absence of additional evidence, the prosecutor's reason for striking a juror which is based on a belief that is ultimately proved incorrect does not establish by clear and convincing evidence that the state court's finding of fact was erroneous. *See*, *McNair v. Campbell*, 416 F.3d 1291, 1311 (11th Cir. 2005), *cert. denied*, 547 U.S. 1073, 126 S.Ct. 1828, 164 L.Ed.2d 522 (2006). The proper focus required by step two is of the genuineness of the motive rather than the reasonableness of the asserted nonracial motive. *Purkett ,* 514 U.S. at 768-769, 115 S.Ct. at 1771.

At step three, it was for the court to determine whether the prosecutor struck Morris because he believed him to be single. Even though the record reflects that Morris was in fact married, the fact that the prosecutor was incorrect about Morris' marital status did not prevent the court from making a credibility determination based on the testimony at the hearing that the prosecutor struck Morris because he was single. When given an opportunity to supplement the record, the prosecutor did not make an alternative argument but rather acknowledged that he was mistaken about Morris' marital status when he struck him.

The fact that Jacks, Johns, and Montgomery were allowed to serve on the petit jury despite having some knowledge of the case does not indicate racial discrimination as the prosecutor's notes reflected that they were married (Vol. 19, p. 1066) while he

believed, and his notes reflected, that Morris was single. Vol 19, p. 1083.

Adkins argues that the prosecutor did not explain how the marital status of Morris and six other African Americans who were struck from the jury was related to the case. He also complains that the trial court supplied the reason for the prosecutor when he stated in his order:

> The District Attorney stated that it was their goal in jury selection to have jurors who were married. **The primary defense of the defendant to the capital murder charges was that the defendant did not rape the victim, Mrs. Hamilton. It was the contention of the defendant that he met the victim, a married woman, and during the process of showing the defendant several homes to buy, the victim consented to having sexual relations with him several times during the day.** It was the position of the District Attorney that married jurors were preferable to single jurors.

(Emphasis added).

The prosecutor testified that he struck black jurors Morris, Turner, Moorer,[23/] Martin and Davis at least in part because they were single. Vol 8, R-27, TR 9-13.[24/] He also testified generally: "I think you will find that with one exception, the State struck all single people" (Vol 8, R-27, TR 9); "We struck several of the singles off this jury – black and white" (Vol 8, R-27, TR 9); "My notes reflect that every white juror that served on the jury was married, with one exception, and that was Mr. Jordan, who was a black

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[23/] Adkins argues that Moorer was widowed and was considered single while Barbara Howell who was divorced was not considered single. The prosecutor was not questioned about and did not testify concerning Howell's marital status. While Howell was not struck by the prosecutor, the defense used its 22nd strike to remove Howell from the jury. Vol. 19, p. 1065.

[24/] Adkins correctly observes that the prosecutor did not state that he struck Tobe Williams and Joann Clark because they were single. He states that both the trial court and the Alabama Court of Criminal Appeals upheld these strikes based in part on the fact that they were single. The trial court indicated in its order that they were struck in part because they were single. Although the prosecutor did not give marital status as a reason for the strikes of Williams and Clark, the *voir dire* transcript confirms that Clark was single. Vol. 2, R-4, TR 220. Further, the transcript reflects that Williams described himself as "married, my wife is deceased." Vol. 2, R-4, TR 318. The Alabama Court of Criminal Appeals did not indicate that either Clark or Williams was struck due to marital status. Rather, the appellate court held that Williams was struck because he knew one of the lawyers and Clark was struck because a family member had been prosecuted for a crime. *Adkins v. State*, 639 So.2d 515, 518 (Ala. Crim. App. 1993).

juror that served, who reported that he was single." Vol 8, R-27, TR 15.[25/]

Adkins asserts that it was not sufficient for the prosecutor to say that he chose to strike jurors who were single but that the prosecutor (rather than the judge) was also required to state specifically how a juror's marital status was related to the case.

In *Purkett v. Elem*, the Supreme Court stated:

> The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a *prima facie* case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Batson, supra*, 476

[25/] He explained his reason for not striking the one single person who served on the jury:

> The black juror that served on this jury was Mr. Daris Jordan. He was Juror No. 30. Daris Jordan was thirty-three years old and a black male and employed. It was reported that he was single. That was contrary to some information that I had. He did live with a lady, but he said he was single. He was a former grand juror was one of the reasons we chose to leave him on there. He had served with some of my assistant D.A.'s, particularly Mr. Lamar Williamson. He also went to school with and knew one of my assistant D.A.'s, Mr. Gibson Holladay. I personally knew Mr. Jordan. I never had any business relations with him, but I knew Daris from being around here in town. For those reasons, we felt they outweighed the fact that he was single.

Vol. 8, R-27, TR. 15-16. During *voir dire*, Jordan specifically testified that he was a bachelor. Vol. 2, R-4, TR 242.

> U.S., at 98, n. 20, 106 S.Ct., at 1724, n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)), and that the reason must be "related to the particular case to be tried," 476 U.S., at 98, 106 S.Ct., at 1724. See 25 F.3d, at 682, 683.
>
> This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. See *Hernandez, supra*, at 359, 111 S.Ct., at 1866; cf. *Burdine, supra*, at 255, 101 S.Ct., at 1094 ("The explanation provided must be legally sufficient to justify a judgment for the defendant").

514 U.S. at 768-769, 115 S.Ct. at 1771. The Supreme Court concluded that an explanation that a juror was struck "because he had long, unkempt hair, a mustache, and a beard--is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike." 514 U.S. at 769, 115 S.Ct. at 1771. The court observed that none of these characteristics is peculiar to any race. Similarly, in *Rice v. Collins*, the Court found that the explanation that a juror was struck because she "had rolled her eyes in response to a question from the court; that [she] was young and might be too tolerant

of a drug crime; and that [she] was single and lacked ties to the community" satisfied the prosecution's step two burden. 546 U.S. 333, 336-342, 126 S.Ct. 969, 973, 163 L.Ed.2d 824 (2006).

"Single" as a marital status is not a characteristic peculiar to any race; therefore, the explanation that jurors were struck because they were "single" is race neutral and satisfied the prosecution's step two burden of stating a nondiscriminatory reason for the strike. The prosecutor was not required to explain how marital status of jurors was related to the theory of the case.

B. Strikes Based on Age

Adkins complains that the prosecutor struck six African Americans based on age – Dorothy Woody, 31; Davis Turner, 32; Linda Davis, 36; Dorothy Moore, 53; Fred Woods, 61; and Tobe Williams, 86 – because they were in the same "age bracket" as Adkins, who was 23, thereby excluding four generations of African Americans. At the conclusion of his direct testimony at the *Batson* hearing, the prosecutor stated: "For the record to be clear, the defendant in this case was a single male and in the same age bracket of these people that were struck." Vol. 8, R-27, TR 16. The pertinent testimony of the prosecutor with respect to three of these witnesses is set out below:

> The first strike of a black juror in this case would have been the States's 5th strike, and was Juror No. 59, Mr. Fred D. Wood. One of

> the reasons that the State struck him was because of his age. He was sixty-one years of age. The primary reason we struck him was he came forward when the Court took excuses in this case and asked the Judge to excuse him from jury duty. The reason being he had ulcers and did not want to serve on the jury. He did not want to serve on the Jury.

Vol. 8, R-27, TR 8.

> Juror No. 36, Dorothy Moorer would have been the State's 11th strike. She was fifty-three years old. Again, these ages, we calculated that from the master list from their date of birth. She was also single. That was one of the reasons that the State used. She was unemployed and that was another reason. She also asked the Court to be excused from jury service because she had high blood pressure. For the cumulative effect of those reasons, the Court decided to excuse her from jury service.

Vol. 8, R-27, TR 13.

> The next strike would have been Juror No. 56, Mr. Tobe Williams. Mr. Williams was a black male, eighty-six years of age. That was our primary reason for striking. In addition to that, he acknowledged that he knew Mr. Talmadge Fambrough personally. Mr. Fambrough being one of the defense attorneys in this case. I believe the Court voir dired the

> Jury as to their knowledge or as to whether they have been in the employment or related to the District Attorney's office. Mr. Williams knew me well and did not acknowledge that. When I was in private practice in law here in Pell City with Church, Trussell & Robinson, he did odd jobs for our law firm. We had him in my employment in the past, and he did not acknowledge that. I think because of his age, he probably could not hear the questions and did not understand. I don't think he would deliberately not answer, but he failed to acknowledge the questions propounded to him. And the fact he knew Mr. Fambrough and was eighty-six years of age.

Vol. 8, R-27, TR 12.

To the extent that age factored in with respect to Woods, 61, and Williams, 86, the prosecutor implied that he thought they were too old. Williams was struck in part because he did not acknowledge knowing the prosecutor and doing odd jobs for his old law firm which led the prosecutor to the conclusion that he either did not hear or did not understand the question. The prosecutor testified that he struck Woods in part because he asked to be excused from jury duty due to his ulcer. While the prosecutor stated Moorer's age,[26/] he did not indicate that she

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[26/] Adkins argues that while Moorer, 53, was struck while white jurors who were almost the same age as Moorer were not. He identifies Barbara Davis, 48, Jerry Johns, 48, Jimmy Jacks, 49, and Mary Franklin, 58 as the white

was struck due to that age but rather testified that he struck her because she was single, unemployed and asked to be excused from jury duty due to her high blood pressure.

Despite a general statement by the prosecutor that the African American jurors struck were in Adkins' age bracket, the specific testimony of the prosecutor would indicate that was not the case regarding the strikes of Woods, Williams, and Moorer. The prosecutor's testimony indicates that Turner and Davis were both struck based on both age and marital status of single:

> Juror No. 52, which was the State's 9th strike, David M. Turner. There again, that was due to his age. He was thirty-two years of age. He was single. Our notes indicate he was inattentive and did seem disinterested during the *voir dire* of the case. My recollection was and I did not note this in my notes – he never responded to a single question that was asked on *voir dire* either by the Court or the attorneys during the entire jury selection process.

Vol. 8, R-27, TR 10-11.

> The State's next strike would have been No. 14, Linda Davis. That was a black female. She was single, thirty-six years of age. This

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jurors. As noted above, however, the prosecutor did not state he struck Moorer based on her age.

> particular juror worked with the Department of Human Resources. My office had dealing with her in her capacity with the Department of Human Resources. We had subsequently had dealing with her. The Chief Assistant D.A. who handles most of the cases involving the Department of Human Resources, Mr. Lamar Williamson – I had talked with him about this lady prior to striking this jury. Based on information he provided to me concerning his working relationship with Mr. [sic] Davis, I chose to strike her.

Vol. 8, R-27, TR 13.

The prosecutor's testimony also reflected that Woody was struck based in part on age:

> The State's next strike would have been Dorothy Woody – No. 60 on the strike list. According to my information, Ms. Woody was thirty-one years old. I had done some checking on Ms. Woody through the Town of Margaret where she was from. I found out her maiden name was reported to me to be Hopson. I had had dealings in law enforcement with the Hopson Family. It was also reported to me that her father, Mr. Willie Hopson, had either – my notes were not clear – had either been in prison or was in prison at that time on drug related matters in the Federal Prison. I had also information available to me through the D.A.'s office involving her husband's family

> involving criminal activities. I think I asked the Jury Venire if I had ever prosecuted them or any member of their family. I also asked if they had any family member that had ever been in prison. I don't remember Ms. Woody responding to that. My information was that her father had been.

Vol. 8, R-27, TR 13.

Adkins argues that the prosecutor did not strike Ronnie Crutchfield, a white juror age 35, even though he was the about the same age as Dorothy Woody, 31. Woody was not struck solely based on her age but also based upon the criminal history involving both Woody's own family and her husband's family. Vol 19, p. 1083. There is nothing in the record to indicate a similar a criminal history in Crutchfield's family background. The prosecutor struck five African Americans jurors in their 30s.[27/] He used nine peremptory challenges to strike white jurors in their 20s and 30s. Vol. 19, p. 1083-84. Only two jurors on the trial jury were younger than 40 years of age – Ronnie Crutchfield, a 35-year-old white male, and Daris Y. Jordan, a 33-year-old single African American male. Vol. 19, TR 1066.

As with marital status, age is not a characteristic peculiar to any race; therefore, this explanation was

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[27/] Clark, 39 (Doc. #18,Tab 27a, p. 23 of 27); Turner, 32 (Vol 8, R-27, TR. 10); Martin (Doc. #18, Tab 27a, p. 22 of 27); Woody, 31 (Vol 8, R-27, TR. 13); Davis, 36 (Vol 8, R-27, TR. 13)

race neutral and satisfied the prosecution's burden of stating a nondiscriminatory reason for the strike.

C. Unemployment

Adkins argues that Moorer was struck because she was unemployed while Mary Franklin and Barbara Davis, both white, were not struck. In responding to *voir dire* questions, both Davis and Franklin identified themselves as housewives. Vol. 2, R-4, TR 220, 222. While Moorer identified herself as "unemployed," Vol. 2, R-4, TR 242, her employment status was only one of several factors identified by the prosecution in striking her. In any event, unemployment is not a unique characteristic to one race. Moorer was also single and had asked to be excused due to high blood pressure.

D. Strikes Based on Hardship

Adkins argues as evidence of discriminatory motive the fact that the prosecutor exercised hardship strikes against Woods and Moorer, but not against McKinley Turbville, a white male, who also indicated a potential hardship. The requests of Woods and Moorer to be excused from jury duty were due to health issues (Woods's ulcer and Moorer's high blood pressure) and are supported by the record. Vol. 1, R-4, TR 133-34, 138-39. Turbville's request to be excused from jury duty was based on a dissimilar hardship. During *voir dire* the following exchange occurred between the judge and Turbville:

PROSPECTIVE JUROR

MCKINLEY TURBVILLE:	My supervisor had wrote you a letter to get me off of this.
THE COURT:	Where do you work?
PROSPECTIVE JUROR MCKINLEY TURBVILLE:	Cleveland Electric.
THE COURT:	We have several in that similar situation. We have a limited number of excuses that can be granted, but some serious excuses will be given the first priority, and then go down. I can't guarantee it.
PROSPECTIVE JUROR MCKINLEY TURBVILLE:	To me, it doesn't matter.

Vol. 1, R-4, TR 143. While Woods and Moorer requested to be excused due to medical reasons, Turbville's employer requested that he be excused due to work. Turbville stated unequivocally that it did not matter to him if he was excused. Turbville did not have a hardship. Rather, his employer requested that he not be required to serve as a matter of convenience to the employer. Strikes based on health hardships are not racially discriminatory.

E. Strikes Based on Incorrect Information

As previously discussed, the strike of Morris was based on incorrect information – that is, the prosecutor mistakenly thought Morris was single. Adkins contends that the prosecutor was also incorrect when he testified that Clark had prior knowledge of the case. Clark stated on *voir dire* she had not heard about the case. Vol. 2, R-4, TR 204. Adkins further argues that Clark was struck based on incorrect information that she had a relationship with Reverend Williams who had been prosecuted by the prosecutor. The prosecutor testified:

> Juror No. 8, Joann Clark – that would have been our 8th strike. This was a black female. She also had prior knowledge of the case. I had information available to me that Ms. Clark was married to the Rev. Paul Williams, who was at that time was the Riverside area. I had prosecuted Rev. Williams on numerous occasions. He later moved over to the Odenville area on the Copper Springs Road, where this lady lived with him. Whether they are legally married or not, I don't know. I had also prosecuted him in the District Courts for St. Clair County. I had asked the jurors if I had ever prosecuted them or a member of their immediate family, and Ms. Clark did not respond to that. An additional reason that Ms. Clark was struck is that she acknowledged that she worked in a restaurant by the name of Eleko's [sic]. At that time, that restaurant

> and building was owned by a family or some brothers by the name of Swann. They were being investigated by the law enforcement officers in this county involving gambling activities. They have subsequently been arrested and charged with gambling activities in the area. They were owners and operators – I'm not sure they were the operators at that time when she was employed at that restaurant. Their activities in and around that restaurant were being investigated.

Clark testified at the *Batson* hearing that she knew Reverend Paul Williams:

> Q: Would you tell us whether you know a person by the name of Rev. Paul Williams?
>
> A: I know him. I went to school with him. He is just a friend and lives in the community and stuff like that. That is all I know about him.
>
> Q: Have you ever lived with him?
>
> A: No.
>
> Q: Have you ever been married to him?
>
> A: No.
>
> Q: Have you ever dated him?
>
> A: No.

Q: Did you know anything about some legal trouble that Paul Williams had?

A: No, this is the first time I heard anything about it.

Q: Have you ever been to court with Paul Williams?

A: No.

Vol. 8, R-27, TR 34.

She also testified regarding her employment at Alecko's:

Q: Back at the time you were called for jury duty, you were working at the Elecko [sic] Restaurant?

A: Yes.

Q: Do you still work there?

A: No.

Q: What was your job at the restaurant?

A: I was a cook and then I served on the line.

Q: Who was your supervisor when you worked at the restaurant?

A: Terry Swann.

Q: Was Mr. Swann white or black?

A: He is white.

Q: Do you know anything about any legal trouble that Mr. Swann had?

A: No.

Q: Were you aware of any illegal activity at the restaurant?

A: No.

Q: Were you aware of any investigation regarding the restaurant of any activities there?

A: No.

Q: Were you ever aware of any investigation regarding Mr. Swann or his family members?

A: No.

Vol. 8, R-27, TR 35. On cross-examination by the prosecutor, she again disavowed any association with Reverend Paul Williams and any knowledge of her former employer's gambling activities. Vol. 8, R-27, TR 36.

After a short break, the prosecutors admitted that they were mistaken regarding Clark's association with Reverend Williams.

MR. CAMPBELL: With reference to the witness called by the defense, I would

clarify for the record that on further inspection and conferring with Deputy Surles of the St. Clair County Sheriff's Department, it appears that the information given to us by him was in good faith in regard to her association with Rev. Williams; however, it now appears that was a case of mistaken identity. We would point out for the record that the issue is whether the prosecution had a race neutral reason for excusing this juror. We think the evidence offered in this case is convincing that we did. Even though the information relied on turned out to be in error, we did, in good faith, rely on that information in excusing this juror. Nevertheless it is still correct that she was working at the establishment where some gambling activity was taking place, and where the owner was subsequently charged and I think served time in the penitentiary. We think the State's reasons for excusing this juror is sound and still based on race neutral reasons having relation to the State's interest in prosecuting Ricky Dale Adkins.

MR. DAVIS: Judge, on that same issue–after it was made aware to us that possibly this was not the same lady that had been described to us, I contacted Officer Surles. He was out in the field today on a drug investigation. I checked with him about this information and he again said unequivocally that it was the same person as the same he knew to be associated with this man. He came to the courthouse and we had him to walk down and make physical contact with Ms. Clark. At that point, he said, "I was wrong. That is not who I thought it was."

Vol. 8, R-27, TR 37-39.

The circuit court did not rely on the alleged relationship with Reverend Williams in its order. Vol. 8, TR 45. The Alabama Court of Criminal Appeals, however, stated "The prosecutor also had information that she was married to or lived with an individual he had prosecuted." The appellate court did not refer to the fact that the prosecution admitted that this fact was incorrect. The circuit court observed that Clark worked at Alecko's and that the owner was investigated and subsequently served time in prison. The appellate court was silent with respect to this fact. Regardless of the admission

that the information about Clark's alleged relationship with Reverend Williams was incorrect, the finding of fact by the Alabama Court of Criminal Appeals that Clark was struck because the prosecution had information of such a relationship has not been shown by clear and convincing evidence to be erroneous. *McNair*, *supra*.

F. Strikes Based on Information For Which the Juror Was Never Questioned

Adkins argues that the prosecution struck Janie Martin, Linda Davis, and Tobe Williams for reasons about which they were not questioned and therefore these reasons are "suspect," citing *Miller-El v. Dretke*, 545 U.S. 231, 250, n.8, 125 S.Ct. 2317, 2330-31, 162 L.Ed.2d 196, (2005). *Miller-El* actually states that "the failure to ask undermines the persuasiveness of the claimed concern." *Id.* The prosecutor testified:

> The next is Janie M. Martin. That would be No. 31. Ms. Martin was from the Margaret area. I had talked to people in the Margaret area about Ms. Martin. She also had prior knowledge of the case. I'm not quite sure how she knew that. She was single. My information that I developed in my investigation of the jurors was that she had been associated with the former Chief of Police of Margaret, who was Albert McIntire. Mr. McIntire had to resign as Chief of Police of the Town of Margaret while I was City Attorney

> for that town. He resigned under circumstances that – although which never arose in any type criminal proceeding – I was involved in that as City Attorney and City Prosecutor at the time he left. It involved some misconduct on the part of Mr. McIntire, and she was seeing him and dating him. I also had information that maybe the way she knew about the case was she was dating or had been dating a state trooper here in the area at the time.

Adkins argues that the prosecutor never asked Janie Martin about her relationship with the former police chief. Adkins points out that Linda Davis was not questioned about her role at the Department of Human Resources and her working relationship with the prosecutor's office. He also asserts that Williams was never questioned about his hearing nor whether he had been employed by the prosecutor's old law firm. The record clearly reflects that Williams's panel (panel 3) was questioned by defense counsel:

> MR. BARRETT: Any of you, you or your immediate family, worked in a law office as a legal secretary or paralegal, anything to do with a law office?

Vol. 2, R-4, TR 312. Williams did not respond to this question. The prosecutor, however, had personal knowledge of Williams's employment with his old law firm. He also had personal knowledge of the circumstances surrounding the former police chief's

resignation and had information that Martin had been associated with the former chief of police. The prosecutor had either personal knowledge or information provided to him by assistant district attorneys about working relationship with Linda Davis and the district attorney's office. In light of this knowledge or information, questioning was unnecessary in order for the prosecutor to exercise the race neutral strikes. Further, as previously stated, the prosecutor specifically offered as an explanation that Martin and Davis were struck because they were single, a race neutral reason.

The decisions of the circuit court and Alabama Court of Criminal Appeals with respect to the *Batson* claim did not result in a decision that was contrary to or involved an unreasonable application of clearly established federal law or that the decision of the appellate court was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Adkins is not entitled to habeas relief on the *Batson* claim.

. . .

As to the foregoing it is SO ORDERED this the 10th day of June, 2009.

s/ Harwell G. Davis III
HARWELL G. DAVIS III
UNITED STATES
MAGISTRATE JUDGE