No.

In the Supreme Court of the United States

JAMES GARFIELD BROADNAX, PETITIONER

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

STEVEN C. HERZOG
Counsel of Record
PIETRO J. SIGNORACCI
EVA WENWA GAO
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
sherzog@paulweiss.com
psignoracci@paulweiss.com
wgao@paulweiss.com

CAPITAL CASE

QUESTION PRESENTED

In this capital case involving a Black defendant and two White victims, the prosecution disclosed to Petitioner's counsel, only after state habeas proceedings had concluded, (1) a spreadsheet used by prosecutors during jury selection that tracked each qualified prospective juror by race and singled out the Black prospective jurors by marking them in bold text, and (2) a prosecutor's notes establishing that race was the basis for striking a qualified Black juror. The prosecution struck all seven Black prospective jurors during jury selection.

"Because of the risk that the factor of race may enter the criminal justice process, [this Court has] engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey* v. *Kemp*, 481 U.S. 279, 309 (1987) (quoting *Batson* v. *Kentucky*, 476 U.S. 79, 85 (1986)), and in particular from jury selection, *see Powers* v. *Ohio*, 499 U.S. 400, 404–10 (1991); *Miller-El* v. *Cockrell*, 537 U.S. 322, 341–47 (2003) ("*Miller-El I*"); *Miller-El* v. *Dretke*, 545 U.S. 231, 237–40 (2005) ("*Miller-El II*"); *Snyder* v. *Louisiana*, 552 U.S. 472, 476–86 (2008); *Foster* v. *Chatman*, 578 U.S. 488, 499–514 (2016); *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2238–51 (2019). The newly disclosed evidence of *Batson* violations in Mr. Broadnax's case demonstrates that the Court's work is not done.

Having been only recently admonished in *Miller-El I* and *Miller-El II* for a well-documented culture of racial discrimination in jury selection, Dallas prosecutors put in writing—in a document created by the State during the 2009 jury selection process that was not produced by the State to Mr. Broadnax until 2021—that race was the "*only concern*" with a Black prospective juror:

Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. B (excerpted; highlighting added).

Dallas prosecutors then withheld this evidence of their race-based motives for striking Black jurors until it was too late for Mr. Broadnax to present that evidence during the initial state and federal review of his conviction. Review is necessary here because the newly disclosed evidence establishes that a DA's office with a long and notorious history of racially discriminatory jury selection practices continued to flout this Court's direction. Left undisturbed, the State's explicit discrimination will erode the Court's authority and public confidence in our criminal justice system.

The question presented here is: Whether the Texas Court of Criminal Appeals' decision that Mr. Broadnax failed to establish a prima facie equal protection claim conflicts with this Court's *Batson* jurisprudence?

RELATED PROCEEDINGS

Criminal District Court of Texas (Dallas County):

State v. *Broadnax*, No. F08-24667-Y (Aug. 21, 2009)

Ex parte Broadnax, No. W08-24667-Y(A) (Sept. 17, 2014)

Ex parte Broadnax, No. W08-24667-Y(B) (Feb. 6, 2023)

Texas Court of Criminal Appeals:

Broadnax v. *State*, No. AP-76,207 (Dec. 14, 2011)

Ex parte Broadnax, No. WR-81,573-01 (May 20, 2015)

Ex parte Broadnax, No. WR-81,573-02 (June 7, 2023)

United States District Court (N.D. Tex.):

Broadnax v. *Davis*, Civ. No. 15-1758 (July 23, 2019)

United States Court of Appeals (5th Cir.):

Broadnax v. *Lumpkin*, No. 19-70014 (Feb. 8, 2021)

United States Supreme Court:

Broadnax v. *Texas*, No. 11-9294 (Oct. 1, 2012)

Broadnax v. *Texas*, No. 14-9964 (Oct. 5, 2015)

Broadnax v. *Lumpkin*, No. 21-267 (Jan. 18, 2022)

TABLE OF CONTENTS

Page

Opinions Below 1
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 2
A. Background 5
B. Facts and Procedural History 8
Reasons for Granting the Petition 16
A. This Court Should Grant Review to Vindicate Important *Batson* Rights. 16
a. The newly disclosed evidence establishes multiple *Batson* violations. 17
b. The state court decision, if left to stand, will create perverse incentives for state prosecutors to conceal evidence of *Batson* violations. 25
B. There Is No Independent and Adequate State Ground Supporting the Decision Below. 26
Conclusion 29
Appendix A 1a
Appendix B 3a

TABLE OF AUTHORITIES

Cases:

Ake v. *Oklahoma*,
470 U.S. 68 (1985) 26

Batson v. *Kentucky*,
476 U.S. 79 (1986) 19, 21

Coleman v. *Thompson*,
501 U.S. 722 (1991) 27–28

Cruz v. *Arizona*,
143 S. Ct. 650 (2023) 26

Cullen v. *Pinholster*,
563 U.S. 170 (2011) 4, 5, 7

Ex parte Campbell,
226 S.W.3d 418 (Tex. Crim. App. 2007) 8, 27

Flowers v. *Mississippi*,
139 S. Ct. 2228 (2019) 5–7, 17, 19, 21, 24

Foster v. *Chatman*,
578 U.S. 488 (2016) 6, 16, 18, 19, 25–27

Miller-El v. *Cockrell*,
537 U.S. 322 (2003) 6, 7, 9, 20, 24

Miller-El v. *Dretke*,
545 U.S. 231 (2005) 4–7, 9, 19, 21–25

Smith v. *Texas*,
550 U.S. 297 (2007) 27

Snyder v. *Louisiana*,
552 U.S. 472 (2008) 6, 19, 22

Statutes:

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2254(d) 4, 7, 25

Tex. Code Crim Proc. Art. 11.071 § 5(a)(1) 2, 4, 8, 16

In the Supreme Court of the United States

No.

JAMES GARFIELD BROADNAX, PETITIONER

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

James Garfield Broadnax respectfully petitions for a writ of certiorari to review the order of the Court of Criminal Appeals of Texas dismissing his amended first subsequent habeas application for relief from his conviction and death sentence.

OPINIONS BELOW

The notation of the Dallas County Criminal District Court forwarding Petitioner's amended first subsequent habeas application to the Court of Criminal Appeals of Texas (App. A, *infra*, at 1a) is unreported. The order of the Court of Criminal Appeals of Texas dismissing Petitioner's amended first subsequent habeas application

(App. B, *infra*, at 3a) is not published in the South Western Reporter, but is reproduced at 2023 WL 3855947.

JURISDICTION

The order of the Court of Criminal Appeals of Texas was entered on June 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Tex. Code Crim Proc. Art. 11.071 § 5(a)(1), which states, in relevant parts, as follows:

"If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."

* * *

STATEMENT OF THE CASE

Petitioner James Broadnax is a Black man who, at the age of 19, was convicted and sentenced to death for the

murder of two White victims, by a nearly all-White jury in Dallas, Texas, after a trial marked by racial undertones. During jury selection, the State used nearly half of its peremptory strikes to remove all seven Black prospective jurors from the pool of 47 qualified venire members. While the trial court was troubled by the "disproportionate number of African-Americans who were struck," and restored a Black juror struck by the prosecution, it noted that it was reluctant to do so because "[t]he problem . . . of course, is that if you grant a *Batson* challenge it implies some sort of nefarious intent on the part of the prosecutors." 42 RR 33–35.[1] Mr. Broadnax unsuccessfully sought review of the trial court's decision denying his *Batson* challenges to the prosecution's strikes of the other six Black jurors on direct appeal and during state habeas.

After Mr. Broadnax had exhausted his state remedies, and while his federal habeas petition was pending, the Dallas County District Attorney's Office disclosed for the first time in June 2016 a spreadsheet used by the prosecution during jury selection that tracked all of the prospective jurors by race, and singled out in bold text all of the potential Black jurors. *See* Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 8–9; *see also id.* Ex. A, reproduced *infra* at 14. Metadata later disclosed by the Dallas County District Attorney's Office confirmed that the spreadsheet had been created, used, modified, and printed during jury selection. *Id.* at 27; *see also id.* Ex. F, Ex. G. Then, in the fall of 2021, the Dallas County District Attorney's Office disclosed for the first time a prosecutor's handwritten notes from jury selection about one of the Black jurors, which stated that the juror "[s]eems okay . . . ***Only concern*** . . . [Defendant]'s ***age + race*** w/ Juror's son ***age + race***, as mentioned." *Id.* at 25; *see also*

[1] "RR" refers to the Reporter's Record of the trial transcript.

id. Ex. B, reproduced *infra* at 15 (emphasis added). This Court had held as early as 2005, in a case involving the Dallas County District Attorney's office (the same office that prosecuted Mr. Broadnax), that evidence of this type was highly relevant to the *Batson* analysis. *See Miller-El* v. *Dretke*, 545 U.S. 231, 240, 264 (2005) ("*Miller-El II*").

Mr. Broadnax sought to introduce the newly disclosed spreadsheet in his then-pending federal habeas proceedings. However, both the federal district court (in July 2019) and the Court of Appeals (in February 2021) concluded that, pursuant to this Court's interpretation of 28 U.S.C. § 2254(d), they could not consider this new evidence because it had not been considered by the state courts. *See Broadnax* v. *Lumpkin*, 987 F.3d 400, 404 (5th Cir. 2021); *Broadnax* v. *Davis*, 2019 WL 3302840, at *19 (N.D. Tex. July 23, 2019) (citing *Cullen* v. *Pinholster*, 563 U.S. 170, 181–82 (2011)). This Court subsequently denied Mr. Broadnax's petition for certiorari. *Broadnax* v. *Lumpkin*, 142 S. Ct. 859 (2022).

Mr. Broadnax then filed a subsequent state habeas application pursuant to Tex. Code Crim. Proc. Art. 11.071 §5(a)(1), which permits a petitioner to seek relief based on evidence that "was unavailable on the date the applicant filed the previous application." Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 43–44. The State opposed this application, arguing that Mr. Broadnax "fail[ed] to make a prima facie showing of a constitutional violation" even with the previously unavailable evidence. Mot. Dismiss Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 9–10. In a summary order, the Court of Criminal Appeals of Texas dismissed Mr. Broadnax's application. App. B at 4a.

The Texas court's decision cannot be squared with this Court's established case law on *Batson*, which requires that "all relevant circumstances" should be considered—

especially the State's own jury selection files demonstrating inappropriate race-related motives and considerations. *See, e.g.*, *Miller-El II,* 545 U.S. at 240 (2005). The consequences of the court's errors are amplified where, as here, the State *chose to withhold* these critically relevant documents *until after* all of the original state court proceedings had been concluded, effectively foreclosing the new evidence from federal habeas review. *See Pinholster*, 563 U.S. at 182–85. Because the State's deliberate choices rendered a subsequent habeas application in state court the *only* venue in which the previously withheld evidence could still be considered, it was critical that the state court apply the *Batson* standards correctly, and give appropriate weight to the newly disclosed evidence that establishes a *Batson* claim. This Court's intervention is justified both to address and correct the serious *Batson* violations in this case, and to ensure that prosecutors are not encouraged to withhold evidence of *Batson* violations in analogous proceedings.

A. Background

1. This Court's jurisprudence under *Batson* was intended to address precisely the type of situation presented by Petitioner here. "[F]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Miller-El II*, 545 U.S. at 238. As this Court has stressed, this means that "even a single instance of race discrimination against a prospective juror is impermissible." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2242 (2019).

The *Batson* inquiry consists of three steps: (1) a prima facie showing by defendant that a peremptory challenge has been exercised "on the basis of race;" (2) consideration of any race-neutral explanations by the prosecution

for striking the juror in question; and (3) a determination whether, all circumstances considered, defendant has demonstrated "purposeful discrimination" on the part of the prosecution. *Miller-El* v. *Cockrell*, 537 U.S. 322, 328–29 (2003) ("*Miller-El I*") .

The third step in the *Batson* framework centers on evidence of discriminatory intent. *See Foster* v. *Chatman*, 578 U.S. 488, 501 (2016). As this Court has noted, "[t]he rub . . . has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences." *Miller-El II*, 545 U.S. at 238. Accordingly, this Court has emphasized that "in 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." *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added). Indeed, anything less would be essentially "blind[ing] ourselves" from probative evidence of discriminatory intent. *Foster*, 578 U.S. at 501*; see also id.* ("[D]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available."); *Flowers*, 139 S. Ct. at 2243–45 (reiterating the importance of relying on "all relevant circumstances" based on "a variety of evidence"); *Miller-El II*, 545 U.S. at 240 (same).

Evidence documenting the prosecution's purposeful efforts to categorize and track prospective jurors by race during jury selection has been recognized by this Court as highly probative to the *Batson* analysis. In both *Miller-El I* and *Miller-El II*, the Court relied on "the fact that the prosecutors marked the race of each prospective juror on their juror cards" to find that the Dallas District Attorney's Office—the same office that peremptorily struck all Black prospective jurors from Mr. Broadnax's trial—"had

followed a specific policy of systematically excluding blacks from juries." *Miller-El I*, 537 U.S. at 347; *Miller-El II*, 545 U.S. at 263. Similarly, in *Foster*, this Court called out "the persistent focus on race in the prosecution's file"—which included various lists and notes singling out Black prospective jurors through highlighting or other annotations—to "plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." 136 S. Ct. at 1754–55.

Also relevant is statistical information concerning the peremptory strikes in the case at hand, historical evidence of the State's discriminatory jury selection practices in past cases, side-by-side comparisons of the questioning of and challenges to Black and White prospective jurors, and changes or inconsistencies in the prosecutor's stated race-neutral reasons for striking Black jurors. *See, e.g.*, *Flowers*, 139 S. Ct. at 2243 (providing an unexhaustive list of probative evidence under *Batson*). This Court has emphasized that there is no need to decide whether "any one of those . . . facts alone would" establish a *Batson* violation, as long as "all of the relevant facts and circumstances taken together" do so. *Id.* at 2235.

2. Federal courts are limited in their ability to review new evidence presented for the first time during federal habeas proceedings. 28 U.S.C. § 2254(d)(2). In *Pinholster*, this Court confirmed that the "backward-looking language" of Section 2254(d) requires federal courts to review only "the record before the state court" when considering any claim that had been adjudicated on the merits in a state court. 563 U.S. at 181–82. As a result, federal courts are generally barred from considering new evidence disclosed after the conclusion of state habeas proceedings, for which criminal defendants must instead seek relief in state venues only.

3. In Texas, a subsequent application based on newly available evidence is permitted if it "contains sufficient specific facts establishing" a new "factual or legal basis for the claim" that was previously unavailable. Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1). Following the filing of a subsequent application, the Texas Court of Criminal Appeals conducts a threshold review to determine whether the requirements under § 5(a)(1) have been satisfied. *Id.* § 5(c). Texas courts interpret § 5(a)(1) to include two elements: (1) that the newly asserted factual or legal basis has "not been and could not have been presented previously" in the initial state habeas proceeding; and (2) that "the specific facts alleged, if established," would make a "[p]rima [f]acie [s]howing" of "a federal constitutional violation sufficiently serious as to likely require relief from [the applicant's] conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421–22 (Tex. Crim. App. 2007).

B. Facts and Procedural History

1. Mr. Broadnax was sentenced to death in August 2009 at the age of 19 for the murder of two White victims. *See* 54 RR 6–7. The State (over Mr. Broadnax's objections) struck every qualified Black juror, and following the final (and seventh of) such strike, the trial court restored one of the struck Black jurors to the jury. 38 RR 9, 14, 26, 44, 51, 69, 71; 42 RR 33–35. Mr. Broadnax was thus convicted and sentenced to death by a nearly all-White jury as a result of the prosecution's strikes. The prosecutors at trial repeatedly referred to Mr. Broadnax's race, as well as to the race of the victims, telling the jury that Mr. Broadnax sought out the crime scene "because that's where the rich white folks live," and that he deserves the death penalty because "once he's tasted the human blood, he ain't going to be able to stop"—just

like the animal "predator[s]" that "we like to watch" on "Animal Planet." 45 RR 50; 53 RR 74–75.

2. The *voir dire* of qualified jurors in Mr. Broadnax's 2009 trial started in April, and ended in July. 5 RR 3; 37 RR 49. During this process, prospective jurors who were opposed to or felt uncomfortable with the death penalty were categorically excluded from the pool. 37 RR 49–50. This resulted in a group of 47 qualified prospective jurors, of which seven were Black, two were Hispanic, and 38 were White. *Id.* at 46–48; Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. A, reproduced *infra* at 14.

The State engaged in selective and race-based questioning of Black prospective jurors during *voir dire*. Five of the seven Black prospective jurors were given a graphic description of the execution process, and/or directed to look at Mr. Broadnax before the prosecutor asked whether they could find it in themselves to sentence him to death. 10 RR 23; 11 RR 123; 13 RR 249–50, 30 RR 36–37; 34 RR 21–22. But the majority of White prospective jurors were *not* subjected to this treatment, including three White venire members who expressed varying degrees of nervousness about participating in a death penalty case. *See* 10 RR 96; 13 RR 70; 56 RR 135; *cf. Miller-El I*, 537 U.S. at 332–33 (examining racially disparate questioning of venire members); *Miller-El II*, 545 U.S. at 256–63 (same).

What is more, some of the prosecutor's questions to the Black prospective jurors invoked race as a basis for doubting their ability to sit on the jury. For example, with one 70-year-old Black female juror, the prosecutor first said that his own mother (who is also Black) would find it "very difficult" to "put aside the injustices that were done in her day" when it was "a young black man on trial." 11 RR 115, 122. Having laid that groundwork, the prosecutor then directed the prospective juror to look at Mr.

Broadnax, described the death penalty graphically, and asked her twice: "Do you really think in your heart of hearts that you can take part in that process?" *Id.* at 123. Not satisfied with the firm "yes" that the prospective juror gave in answer, the prosecutor pressed again: "Looking at this young man sitting over here right now, do you think because of his age ***or the way he looks*** or anything like that, that there's going to be some sympathy that's going to creep into your verdict if you're asked to give a fair verdict?" *Id.* at 143 (emphasis added).

Similarly, with another Black male juror, Mr. Curtis D. Riser, the prosecutor first asked: "[Y]ou're sitting in the case of a black man . . . Do you feel like you owe him any allegiance because of that?" 13 RR 251. Even though Mr. Riser answered "No," the prosecutor continued: "So, in terms of race . . . There is not a problem for you in that . . . somebody could potentially say to you afterwards, how could you do that to another black man?" *Id.* at 252.

3. Out of the pool of 47 qualified prospective jurors, the State exercised a total of 15 peremptory strikes, striking all seven Black prospective jurors and one of the two Hispanic prospective jurors. *See* 38 RR 9, 14, 21, 26, 44, 51, 69, 71, 79. The resulting jury would have been all White, as the defense had struck the other Hispanic juror (after the State had used up all of its peremptory strikes). *Id.* at 79, 82–83; *see also* Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. A, reproduced *infra* at 14. Mr. Broadnax's defense counsel objected to each of these strikes, and the trial court held a *Batson* hearing on July 30, 2009. 38 RR 9, 14, 21, 26, 44, 51, 69, 71; 42 RR 3–5.

The State's primary argument at the *Batson* hearing was that it struck every prospective juror who was "not in favor of the death penalty." 42 RR 7–8. But two of the Black prospective jurors who were struck expressly indicated otherwise. *See* 57 RR 103, 122. In fact, one of them

ranked herself a 7 out of 10 on a scale of support for the death penalty, higher than some of the White jurors who were acceptable to the State. *Compare, e.g.*, 57 RR 106 *with* 55 RR 124, 276. The State argued this particular Black juror had said she had "mixed feelings" regarding death penalty, even though she clarified during *voir dire* that she meant to say "I'm for it on some cases and I'm against it on some other cases . . . [d]epending on the situation." 30 RR 31; 38 RR 45. In contrast, the State accepted multiple White jurors who had selected a similar option on the jury questionnaire, which stated "I believe that the death penalty is appropriate in some murder cases, and I could return a verdict in a proper case which assessed the death penalty." *See, e.g.*, 55 RR 273, 178; *see also* 42 RR 11. The State also accepted a number of White jurors who expressed an equivalent or greater degree of hesitation towards the death penalty during *voir dire* or on the jury questionnaire. *See, e.g.*, 7 RR 29; 13 RR 89–90; 55 RR 121; 57 RR 141.

The State's other proffered reasons for striking the minority prospective jurors were similarly at odds with the facts. According to the State, the fact that a Black juror had received a deferred adjudication in a bad check case in 1999 was an appropriate basis for a strike, while the fact that a White juror had pled guilty to driving while intoxicated was not. 38 RR 48–49; *compare* 57 RR 110 *with* 56 RR 145. Also according to the State, having "four children and no job" was an appropriate basis for peremptorily striking a Hispanic prospective juror, but so was being "a single woman with no children" when the prospective juror was Black. *Compare* 38 RR 22 *with id.* at 10. And while the State claimed to have struck a third Black prospective juror partly because her questionnaire had spelling and grammatical errors, it did not raise similar objections to White jurors whose questionnaires exhibited

the same problems. *Compare, e.g.*, 38 RR 17 *with* 56 RR 139, 141–46, 154. The State also misrepresented the record regarding Mr. Riser—the same Black juror who was questioned about his "allegiance" to a fellow Black male defendant by the prosecutor. The State claimed that Mr. Riser's statement during jury selection "I see my son in this room . . . gave [the prosecutor] pause because apparently his son is about the same age as this particular defendant." 38 RR 28–29. However, Mr. Riser had explained that he was referring to the bailiff and counsel in the courtroom, not Mr. Broadnax. 13 RR 249.

4. At the conclusion of the *Batson* hearing, the trial court restored one prospective Black juror who had been struck—but not because it found any discriminatory intent in the State's exercise of its peremptory strikes. Instead, the trial court went out of its way to clarify that it did *not* engage in that analysis: "[O]ne could conclude if I grant a *Batson* challenge that [the State's] reasons for challenge were contextual, that being false . . . I would not conclude that . . . I'm not in the business of min[in]g subjective decisions." 42 RR 34. Rather, the trial judge reinstated one single Black juror simply "because of the fact that there are no African-American jurors on this jury and there was a disproportionate number of African-Americans who were struck," and "it does concern me quite a bit that one hundred percent of the African-American jurors were struck from the panel and that there are none on the jury"—although he reiterated that this decision "is not to be considered in any way as some sort of negative context on any lawyers in this case." *Id.* at 33–35. The trial judge also expressed his "problem" with the whole line of *Batson* cases:

> ***The problem with all of these cases***, of course, is that if you grant a *Batson* challenge it implies some

> sort of nefarious intent on the part of the prosecutors. When you say it's a pretext, you're essentially saying that the prosecutors are lying. ***That's the problem I have with the whole line of cases***.

Id. at 33 (emphasis added). Mr. Broadnax was subsequently convicted and sentenced to death by 11 White and 1 Black jurors.

5. In 2011, the Texas Court of Criminal Appeals affirmed Mr. Broadnax's conviction on direct appeal, rejecting, among others, his claim that the State's strikes of the Black jurors had violated *Batson*. *Broadnax* v. *State*, 2011 WL 6225399, at *4 (Tex. Crim. App. Dec. 14, 2011). Mr. Broadnax timely initiated state habeas corpus proceedings, during which he requested the prosecution's jury selection files and related documents. Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. D at ¶ 2. The State, however, refused to produce any of these documents. *Id.* In 2015, the Texas Court of Criminal Appeals denied Mr. Broadnax's habeas petition. *Ex parte Broadnax*, 2015 WL 2452758, at *1 (Tex. Crim. App. May 20, 2015). In May 2016, Mr. Broadnax petitioned for federal habeas corpus relief, including on the ground that the State's strikes of Black jurors violated *Batson*. *See Broadnax* v. *Davis*, Civ. No. 15-1758, ECF No. 1.

Then, in June 2016, the Dallas County District Attorney's Office reached out to Mr. Broadnax's federal habeas counsel, and made available for counsel's review a group of documents that had been previously requested but withheld during Mr. Broadnax's state habeas proceedings. Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 8–9; *see also id.* Ex. D at ¶ 2. Among those files was the spreadsheet, created and used by the State during Mr. Broadnax's jury selection. *Id.* Ex. A. We reproduce this spreadsheet below:

QUALIFIED JURORS

Qualified #	Juror #	Name	Race/Sex	*Death Penalty #	
1	6	Jerome Mitchell Williams	W/M	2	• 1
2	58	Jason Micah Ross	W/M	2	
3	34	John Edward Wherry	W/M	2	
4	101	Jon D. Desmond	W/M	2	
5	123	Sue McCormick	W/F	3	
6	**165**	**Sharron Denise McCraney**	**B/F**	**3**	
7	134	Edith Elaine Clements	W/F	2	• 2
8	150	Bradley A. Wiltshire	W/M	2	
9	**131**	**Mattie M. Vation**	**B/F**	**2**	
10	227	Alex James Folz	W/M	2	• 3
11	208	Angelita Marin Rivera	Hisp/F	2	
12	**222**	**Curtis Demetre Riser**	**B/M**	**3**	
13	265	Johnny William Sanford	W/M	3	
14	277	Vicki Sue Wood	W/F	2	
15	272	Kelly Lynn McDonald	W/F	2	• 4
16	337	Helen Ann Noble	W/F	2	
17	301	Billy Eugene Henry	W/M	2	
18	284	Heather Sylvia Eger	W/F	2	
19	289	John P. Maguire, Jr.	W/M	2	
20	392	Lisa Lanelle Davison	W/F	2	
21	544	Carl Whitt Jackson	W/M	3	
22	401	Leah Michelle Kunard	W/F	2	
23	451	Bruce Edward McDonald	W/M	2	
24	601	Teresa Elaine Randleas	W/F	2	
25	626	Kimberly Bronwyn Morris	W/F	2	• 5
26	573	Guy Gant Ferreira	W/M	2	• 6
27	596	Rindy Kay Woodward	W/F	2	
28	474	John Joseph Cantwell	W/M	2	
29	660	Alexander Wayne Konkle	W/M	2	
30	551	Wesley Brian Marshall	W/M	2	
31	468	Lance Russell Bedford	W/M	2	
32	412	Steven James Zaidel	W/M	2	• 7
33	684	William T. Stinson	W/M	2	• 8
34	797	Lyle Wynne Livingston	W/M	2	
35	824	Jennifer Robin Stockton	W/F	2	
36	**868**	**Aqwana Swheli Long**	**B/F**	**2**	
37	**930**	**Robert Lee patterson**	**B/M**	**2**	
38	874	William Bruce Kreighbaum	W/M	2	• 9
39	977	Patricia Diane Hodges	W/F	2	
40	**1397**	**Betty Rue Jackson**	**B/F**	**3**	
41	**1062**	**Dedric Olin Morrison**	**B/M**	**2**	
42	1321	Clarence Ray Winfield	W/M	2	• 10
43	1345	John Francis Vessels	W/M	2	• 11
44	1313	Emily Alane Blevins	W/F	2	• 12
45	1094	Barry Douglas Fiddick	W/M	2	Alternate (1)
46	1178	Elsa Yvonne Olvera	Hisp/F	2	
47	1389	George Rene Paradise	W/M	2	
48	1335	James McElroy	W/M	2	Alternate (2)

* With reference to the death penalty, which of the following statements best represents your feelings?
1. I believe that the death penalty is appropriate in all murder cases.
2. I believe that the death penalty is appropriate in some murder cases, and I could return a verdict in a proper case which assessed the death penalty.
3. Although I do not believe that the death penalty ever ought to be invoked, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

Calli:

I need you to type my notes on each of the Jurors I have numbered ~~[illegible]~~ 1-12 and the 2 alternates. My notes are on the respective questionnaire and in the 2 legal Pads.

Also: Please make a copy of the Questionnaire for Juror # 412. Thanks.

Still later, in the fall of 2021, when Mr. Broadnax's federal habeas proceedings had nearly concluded and his petition for a writ of certiorari with this Court was pending, the Dallas County District Attorney's Office disclosed additional documents from its jury selection files. *Id.* at 9. Among those was the hand-annotated jury questionnaire of Mr. Riser, where the State wrote and highlighted: "Believes in [death penalty], but wants to be sure," "Seems very thoughtful w/ his answers during voir dire," and "Not a problem w/ telling his 15-yrs-old kid that he took part in [the death penalty] process." *Id.* Ex. B. Marked in red and circled out in a box, the notes concluded: "Seems okay . . . hardworking, smart. ***Only concern*** . . . [Defendant]'s ***age + race*** w/ Juror's son ***age + race***, as mentioned." *Id.* (emphasis added). The relevant annotations are reproduced below:

Id. (excerpted; highlighting added).

The State also produced a document containing a printout of color photographs for all qualified prospective jurors, which had been used by the State during individual jury selection. *See id.* at 23–24; *see also id.* Ex. E.

6. Both the federal district court and the court of appeals held that their habeas review was limited to "the record before the state court," and therefore could not include the jury selection files disclosed by the State. *Broadnax* v. *Lumpkin*, 987 F.3d 400, 406 (5th Cir. 2020); *Broadnax* v. *Davis*, 2019 WL 3302840, at *19 (N.D. Tex. July 23, 2019). This Court denied certiorari. *Broadnax* v. *Lumpkin*, 142 S. Ct. 859 (2022).

7. In 2023, Mr. Broadnax filed an amended first subsequent habeas application under Tex. Code Crim. Proc. Art. 11.071 §5(a)(1), arguing, *inter alia*, that he was entitled to relief because newly available evidence established multiple *Batson* violations at his trial. Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 1–3. In a two-page order, the Texas Court of Criminal Appeals dismissed the application for failing to satisfy the threshold requirements of Tex. Crim Proc. Code Art. 11.071 § 5(a)(1). App. B at 4a.

REASONS FOR GRANTING THE PETITION

A. This Court Should Grant Review to Vindicate Important *Batson* Rights.

This Court should grant certiorari to prevent Mr. Broadnax from being executed by the State of Texas without any court ever considering whether the recently disclosed evidence establishes violations of his constitutional rights. Unless this Court grants review, no court will ever fully hear, consider, and give weight to this evidence, and assess whether Mr. Broadnax's rights under *Batson* were violated at his capital trial.

This Court has emphasized that *Batson* requires "a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Foster*, 578 U.S. at 501. This is especially so where "contents of the prosecution's file," when combined with other evidence, "plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." *Id.* at 513. Certiorari is appropriate to ensure this important admonition is actually followed.

Even before the State disclosed the jury selection files, the evidence of *Batson* violations in this case was compelling. The statistics of the Dallas County District Attorney's strikes in this and other cases, the disparate

and race-based questions during *voir dire*, the prosecution's misrepresentations of the record concerning Mr. Riser's statements, and side-by-side juror comparisons all tend to establish that the State violated *Batson* when it struck all seven qualified Black jurors at Mr. Broadnax's trial. But the recently disclosed spreadsheet and prosecutor's notes materially change the analysis: they are precisely the type of evidence that this Court has found to be particularly important in analogous cases. The Texas Court of Criminal Appeals seriously erred when it dismissed this evidence out of hand.

Correcting this error is all the more important here, where the example of the underlying procedural posture would otherwise signal to state prosecutors that they can withhold critical *Batson* evidence until direct appeal and state habeas proceedings are concluded, and thus shield such *Batson* evidence—and potential *Batson* violations—from ever being considered or reviewed.

a. The newly disclosed evidence establishes multiple *Batson* violations.

Four years ago, this Court explained that "a variety of evidence" should be considered probative for *Batson* claims, including (1) "statistical evidence about the prosecutor's use of peremptory strikes," (2) evidence of "disparate questioning and investigation," (3) "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck," (4) the "prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing," (5) "relevant history of the State's peremptory strikes in past cases," and (6) "other relevant circumstances that bear upon the issue of racial discrimination." *Flowers*, 139 S. Ct. at 2243. All six types of evidence support a finding of multiple *Batson* violations in this case.

1. Relevant Circumstances. The newly disclosed jury selection files confirm that race was a central factor in the prosecution's use of its peremptory strikes. The State prepared and used during jury selection a spreadsheet listing each prospective juror by race, and singling out Black prospective jurors in bold. Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. A, reproduced *supra* at 14. As the State was striking each and every Black prospective juror, it had for reference and guidance both this spreadsheet and color photographs that made clear each juror's race. *Id.* Ex. A, Ex. E.

The State was not merely conscious of race during jury selection; its *focus* was race. This is confirmed by the handwritten annotations on the Riser questionnaire, which are full of references to his race: "I see my son in this room b/c son is black and there are black people in this room;" "Does Not feel he owes [defendant] any allegiance b/c he's black. Not a problem if someone asks him how cd he vote to put to death a black man;" and "***Only concern*** … [Defendant]'s ***age + race*** w/ Juror's ***son age + race***, as mentioned." *Id.* Ex. B, reproduced *supra* at 15 (emphasis added). Like in *Foster*, such evidence "plainly belie[s]" the State's purported "color-bind" practice during jury selection, and casts new light on all of the previously available evidence. 578 U.S. at 513.

2. Statistics. The statistics of the State's peremptory strikes in this case are arresting. Out of a pool of 47 qualified prospective jurors, the State used nearly half of its peremptory strikes to eliminate all 7 Black members, who collectively constituted only 15% of the qualified pool. To look at this another way, the State used peremptory strikes on 100% of the eligible Black jurors, and just 18% of the eligible White jurors in the same pool. In cases with even less extreme disparities, this Court has concluded

that "[h]appenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 240–41 (noting that the State had struck "91% of the eligible African-American venire members"); *see also Snyder*, 552 U.S. at 476 (noting that "all 5 of the prospective black jurors were eliminated by the prosecution"); *Foster*, 578 U.S. at 493 (noting that the State "remov[ed] all four of the remaining black prospective jurors"); *Flowers*, 139 S. Ct. at 2235 (noting that the State "struck five of the six black prospective jurors" in the instant trial). "Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'" *Batson* v. *Kentucky*, 476 U.S. 79, 94 (1986).

3. Disparate Questioning. "The lopsidedness of the prosecutor's questioning and inquiry can itself be evidence" of a *Batson* violation. *Flowers*, 139 S. Ct. at 2248. In particular, "[i]f the graphic script is given to a higher proportion of blacks than whites, this is evidence that prosecutors more often wanted blacks off the jury." *Miller-El II*, 545 U.S. at 255. This is confirmed by the record here. Most prospective Black jurors—but not most White jurors—were either directed to look at Mr. Broadnax, and/or given a graphic description of the execution process, while the prosecutor questioned their ability to render a death sentence. *See* 10 RR 23; 11 RR 123; 13 RR 249–50, 30 RR 36–37; 34 RR 21–22. For example, the prosecutor asked one of the prospective Black jurors:

> We're talking about you potentially being a part of taking another person's life. . . . [The judge] will have to go and sign a warrant for the death of the defendant and that's the defendant sitting down there. ***I don't know if you got a good look at him***. ***Take a good look at him***. Are you okay with that?

10 RR 18 (emphasis added). This was then followed by a detailed description of the death penalty:

> If you ultimately found yourself on a case where I had proved to you beyond a reasonable doubt the person was guilty of capital murder and I had proved to you . . . those special issues should be answered in a way that means you're going to kill him . . . that means he's going to go to Huntsville and receive a lethal injection and he is going to die on a gurney, how do you feel about that?

Id. at 23. In response, this juror assured the State that she could evenhandedly deliver a verdict. *Id.* at 24. The State struck her nonetheless. 38 RR 9.

At the *Batson* hearing, the prosecutor justified the strike and this line of questioning on the ground that this particular juror allegedly appeared nervous. *Id.* at 11. But that does not explain why multiple White jurors who similarly admitted nervousness were not subject to the same rigorous questions. One such White juror wrote on her questionnaire that she "would be nervous" if she were chosen as a juror in a death penalty case, 56 RR 135; another answered that she was "nervous about" the possibility of serving on a death penalty jury, 10 RR 96; and a third similarly volunteered that he felt nervous about being present in a criminal proceeding, 13 RR 70. None of these White prospective jurors was asked to look at Mr. Broadnax while hearing a detailed description of the death penalty; and none was struck by the State. 38 RR 13–14, 20, 38. This Court has already explained how such disparate questioning can be used as a technique to "elicit responses that would justify the removal of African-Americans from the venire." *Miller-El I*, 537 U.S. at 345.

The State was also preoccupied with whether the Black prospective jurors owed any "allegiance" to Mr.

Broadnax because they were both Black. *See, e.g.*, 11 RR 122–23, 143; 13 RR 250–53. As this Court has emphasized "[i]n some of the most critical sentences in the *Batson* opinion," the Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Flowers*, 139 S. Ct. at 2241 (quoting *Batson*, 476 U.S. at 97).

4. Side-by-Side Comparisons. There is evidence of pretext when "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve." *Miller-El II*, 545 U.S. at 241. In the proceedings below, Mr. Broadnax offered detailed side-by-side comparison analyses for each of the minority prospective jurors the State had struck. *See* Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 33–43. We present two examples here.

First, one of the Black prospective jurors stated in her jury questionnaire that she was in favor of the death penalty, that she believed the death penalty is used too seldom and never has been misused "to [her] knowledge," and ranked herself a 7 out of 10 on a scale of support for the death penalty. 57 RR 103, 106. Although she believed intoxication was a mitigating circumstance, she specifically stated during *voir dire* that she would be able to render a death sentence against a defendant who was intoxicated. 30 RR 67–68. Still, the State struck her because it purportedly considered her opposed to the death penalty, and because she considered intoxication a mitigating factor. 38 RR 45, 47. But the same can be said of multiple White jurors who were not struck. *See, e.g.*, 57 RR 141 (accepted White juror writing on his questionnaire: "It bothers me to read about all the death row inmates that have been there for years, and be very close to having

their sentence carried out and thankfully exonerated before it could"); 13 RR 90 (accepted White juror stating in *voir dire* that he would support the death penalty only "in certain circumstances"); 27 RR 134 (accepted White juror acknowledging that intoxication could be a mitigating factor).

Second, with respect to prospective juror Mr. Riser, the State provided three reasons for his strike that applied with equal or greater force to multiple White jurors acceptable to the State: (1) his stated concerns about exonerations, (2) his belief in rehabilitation, and (3) the fact that he had relatives who were incarcerated. 38 RR 27–28. But several White empaneled jurors also expressly raised concerns about wrongful convictions. *See* 55 RR 124, 181; 57 RR 144, 277. Another ranked rehabilitation as the most important goal of the criminal justice system. 56 RR 126. And many White empaneled jurors also had relatives who served time in prison. *See* 55 RR 128–29, 280–81; 56 RR 126–27; 57 RR 224–25. "The fact that [the State's] reason [for peremptory strike] also applied to these other panel members, [all] of them white, none of them struck, is evidence of pretext." *Miller-El II*, 545 U.S. at 248.

5. Misrepresentations. Erroneous or shifting representations of the record by the State in response to a *Batson* challenge "naturally give[] rise to an inference of discriminatory intent" because the "stated reason . . . does not hold up." *Snyder*, 552 U.S. at 485. In *Miller-El II*, the Court explained the importance of this factor:

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational

> basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El II, 545 U.S. at 252; *see also Foster*, 478 U.S. at 512–13 (considering "shifting explanations" and "misrepresentations of the record" as evidence probative of *Batson* violations).

The State's representations regarding Mr. Riser illustrate precisely this type of evidence. When defending his strike, the State explained: "He had stated . . . that '*I see my son in this room.*' And that kind of gave me pause because apparently his son is about the same age as *this particular defendant in this case.*" 38 RR 28–29 (emphasis added). But Mr. Riser was *not* comparing his son to the defendant in this case. When asked "[w]hat do you mean, you see him in this room," he answered:

> The lawyer right there. One of those gentlemen in the back is not a lawyer but -- oh, a bailiff. You know, my son is a black boy, and I see him in this room.

13 RR 249.

The prosecutors also stated that a justification for striking Riser was that he "doesn't believe in the death penalty." 38 RR 29. But this is contradicted by the prosecution's own contemporaneous notes regarding Riser's *voir dire*, which included the following notes: "Believes in [death penalty], but wants to be sure;" "Seems very thoughtful w/ his answers during *voir dire*;" "Not a problem w/ telling his 15-yrs-old kid that he took part in [the death penalty] process;" and "Seems okay … ***Only concern*** … [Defendant]'s ***age + race*** w/ Juror's ***son age + race***, as mentioned." Am. First Subsequent Habeas

Appl., No. WR-81,573-02, Ex. B, reproduced *supra* at 15 (emphasis added).

In sum, the State's explanations misrepresented the record to fabricate a pretextual basis for the strike. And the newly disclosed evidence confirms why: the handwritten notes make clear that the prosecution's "[o]nly concern" about Mr. Riser was that he and his son were the same race as the defendant: Black.

6. Relevant History. Finally, it is appropriate to consider "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." *Flowers,* 139 S. Ct. at 2245. With respect to the Dallas County District Attorney's Office, the prosecting authority in this case, this Court has already found a "culture" that "was suffused with bias against African-Americans in jury selection." *Miller-El I*, 537 U.S. at 346–47. Such evidence, while not itself dispositive, is relevant here. *See Miller-El II*, 545 U.S. at 240 ("[A]lthough some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand.")

* * *

The newly disclosed evidence establishes that race played a central role in the State's jury selection process; yet the court below denied Mr. Broadnax any opportunity to present that evidence and have it considered. This Court should grant certiorari to correct this error, and ensure that Mr. Broadnax is not executed following a trial conducted in violation of his constitutional rights to a jury selected without racial bias.

b. The state court decision, if left to stand, will create perverse incentives for state prosecutors to conceal evidence of *Batson* violations.

Because "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available," *Foster*, 578 U.S. at 501, evidence from the State's own jury selection files can be crucial and outcome-determinative for a defendant's *Batson* claims, as they provide the most direct indication of whether "race was on [the government's] mind[] when they considered every potential juror." *Miller-El II*, 545 U.S. at 266. This Court accordingly has recognized that such evidence should be given "significant weight" whenever it may become available. *Foster*, 578 U.S. at 511.

The Texas Court of Criminal Appeals' decision below did not even engage with this newly available evidence, which Mr. Broadnax detailed in his subsequent habeas application. App. B. at 4a. Nor did it permit the claim to proceed to factfinding and further development before the state district court. The consequences of the error are compounded by the procedural context of this case. Typically, relevant *Batson* evidence is available at trial and/or during original state habeas proceedings, where it is developed through the adversary process and is then available for federal habeas review. But in this case, the crucial evidence from the State's jury selection files was withheld from Mr. Broadnax until after state appeals and habeas proceedings had concluded. The federal courts found in Mr. Broadnax's case that they were not able to consider this evidence under 28 U.S.C. § 2254(d) and *Pinholster*. As a result, the only way for Mr. Broadnax to present this evidence in support of his *Batson* claims was by way of a subsequent state writ. Unless this Court grants

certiorari, no court will have ever fully and fairly considered Mr. Broadnax's *Batson* claims in light of all of the relevant evidence and circumstances.

This Court should grant certiorari to ensure that prosecutors are not incentivized to withhold evidence of *Batson* violations until state proceedings have concluded, in hopes that doing so will shield violations from later review.

B. There Is No Independent and Adequate State Ground Supporting the Decision Below.

This Court cannot grant certiorari "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." *Cruz* v. *Arizona*, 143 S. Ct. 650, 658 (2023). This obstacle is not present here, because both well-established Texas law and the procedural history of this case make clear that the decision below was based on the Court of Criminal Appeals' threshold review of the merits of Mr. Broadnax's *Batson* claims.

1. Whenever resolution of a state law question—even when it is a procedural one—"depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985). "In such a case, the federal-law holding is integral to the state court's disposition of the matter," and the holding of the state court "depends on the court's federal-law ruling and consequently does not present an independent state ground for the decision rendered." *Id.* This Court has frequently granted direct review on this ground. *See Foster*, 578 U.S. at 498 (the question of whether new evidence constitutes a "sufficient 'change in the facts'" under state law necessarily implicates the merits of petitioner's *Batson* claim, justifying review); *see*

also, e.g., *Smith* v. *Texas*, 550 U.S. 297, 313–15 (2007) (holding that the Texas Court of Criminal Appeals' order denying relief upon second habeas application did not involve adequate and independent state ground, because "the predicate finding of [the state law] procedural failure . . . is based on a misinterpretation of federal law.").

In this case, the Court of Criminal Appeals stated that it was denying review because Mr. Broadnax "has failed to satisfy the requirements of Article 11.071, § 5(a)." App. B at 4a. The same court has explained that, "to satisfy Art. 11.071, § 5(a)," two elements must be met: (1) "the factual or legal basis for an applicant's current claims must have been unavailable" during his/her previous state habeas applications; and (2) "the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d at 421. The second element requires a "[p]rima [f]acie [s]howing" of "a cognizable constitutional claim," which necessarily involves a substantive review of the underlying constitutional right. *Id.* at 421–22, n. 7 & n. 9 (collecting cases).

Here, there is no dispute that the newly discovered evidence was unavailable to Mr. Broadnax. Mr. Broadnax specifically requested evidence such as the jury selection files during his previous state habeas application, which was withheld from him at that time and only made available during federal habeas proceedings. Am. First Subsequent Habeas Appl., No. WR-81,573-02, Ex. D.

2. In past cases, whenever a state court's judgment rested on an "unelaborated" one-line decision—similar to the ruling in this case—this Court has looked at all of the possible underlying considerations, as well as the surrounding procedural history, to decide whether there was independent and adequate state ground. *Foster*, 578 U.S. at 497–98; *see also Coleman* v. *Thompson*, 501 U.S. 722,

739 (1991) ("It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment."). One method adopted by this Court in such scenarios is to look at the arguments raised below. *See id.* at 740.

Here, when moving to dismiss Mr. Broadnax's subsequent habeas application below, the State did not dispute that the newly disclosed state jury selection files had been unavailable to Mr. Broadnax during his first state habeas proceeding. Instead, the State argued that Mr. Broadnax "fail[ed] to meet his burden of proof" by making "a prima facie showing" on his constitutional claims. Mot. Dismiss Am. First Subsequent Habeas Appl., No. WR-81,573-02, at 8 ; *see also id.* at 9–10. The unelaborated decision below can only be interpreted to rest on the same ground, and the Court of Criminal Appeals' decision is therefore appropriate for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN C. HERZOG
Counsel of Record
PIETRO J. SIGNORACCI
EVA WENWA GAO
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
sherzog@paulweiss.com
psignoracci@paulweiss.com
wgao@paulweiss.com

SEPTEMBER 5, 2023

APPENDIX

TABLE OF CONTENTS

Page

Appendix A: Notation of Subsequent Writ Application, Dallas County Criminal District Court, February 6, 2023 ..... 1a

Appendix B: Order on Subsequent Writ Application, The Court of Criminal Appeals of Texas, June 7, 2023..... 3a

APPENDIX A

IN THE CRIMINAL DISTRICT COURT NO. 7
DALLAS COUNTY, TEXAS

Writ No. W08-24667-Y(B)

Trial Court Cause No. F08-24667-Y

EX PARTE JAMES BROADNAX

Applicant

NOTATION OF SUBSEQUENT WRIT APPLICATION

The undersigned Judge of the Criminal District Court No. 7 of Dallas County, Texas, enters this Notation of a Subsequent Writ Application, in the above-styled cause pursuant to Article 11.071, §5 of the Texas Code of Criminal Procedure.

Applicant is confined pursuant to the judgment and sentence of the Criminal District Court No. 7 of Dallas County, Texas, in Cause No. F08-24667-Y, wherein the Applicant was convicted of the offense of Capital Murder and sentenced to death.

Applicant filed his initial application for writ of habeas corpus on December 20, 2011. Applicant filed a subsequent writ on January 30, 2023.

IT IS THEREFORE ORDERED that the Clerk of this Court assign an ancillary file number to this subsequent writ application, attach this notation to the subsequent writ application, and immediately forward to the Court of Criminal Appeals in Austin, Texas, certified copies of the subsequent writ applica-

tion, this notation, and the order scheduling the Applicant's execution, if scheduled.

IT IS FURTHER ORDERED that the Clerk of this Court send a copy of this notation to Applicant's counsel, Camille M. Knight and Steven C. Herzog and to counsel for the State, Shelly Yeatts within three days of the date this notation is signed by the Court.

SIGNED this the 6th day of February, 2023.

/s/ Chika Anyiam
JUDGE CHIKA ANYIAM
CRIMINAL DISTRICT COURT NO. 7
DALLAS COUNTY, TEXAS
Digitally signed by Chika Anyiam
DN: cn=Chika Anyiam, o, ou,
email=chika.anyiam@dallascounty.org,
c=US Date: 2023.02.06 15:37:38-06'00'

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-81,573-02

EX PARTE JAMES GARFIELD BROADNAX,

Applicant

ON APPLICATION FOR WRIT OF HABEAS
CORPUS IN CAUSE NO. F-0824667-Y
IN CRIMINAL DISTRICT COURT NO. 7
DALLAS COUNTY

Per curiam.

ORDER

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071, § 5.[1]

In August 2009, a jury convicted Applicant of the offense of capital murder for murdering Stephen Swan in the course of robbing or attempting to rob him. TEX. PENAL CODE 19.03(a)(2). The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal,

---

[1] Unless we specify otherwise, all references in this order to "Articles" refer to the Texas Code of Criminal Procedure.

Broadnax v. State, No. AP-76,207 (Tex. Crim. App. Dec. 14, 2011) (not designated for publication), and denied relief on his initial Article 11.071 application for writ of habeas corpus, *Ex parte Broadnax*, No. WR-81,573-01 (Tex. Crim. App. May 20, 2015) (not designated for publication). We received this, Applicant's amended first subsequent application for a writ of habeas corpus, on February 15, 2023.

Applicant presents two allegations in his amended first subsequent application. In Claim 1, Applicant alleges that new, previously-unavailable evidence establishes that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986) at Applicant's trial. In Claim 2, Applicant asserts that new evidence establishes that the State violated Applicant's Fourteenth and Eighth Amendment rights by presenting false and misleading expert testimony and argument at the punishment phase of Applicant's trial.

We have reviewed the amended first subsequent application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the amended first subsequent application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 7th DAY OF JUNE, 2023.

Do Not Publish