No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

DILLION GAGE COMPTON,
Petitioner,

vs.

TEXAS
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a court's comparison of generalizations about all the female prospective jurors who were struck by the prosecution with generalizations about the male jurors not struck by the prosecution, rather than a side-by-side analysis of individual jurors, disregards the basic equal protection principle that one discriminatory strike is too many.

2. Whether Texas exercised its peremptory strikes in a prohibited discriminatory fashion.

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the caption of the case.

LIST OF PROCEEDINGS

- *State v. Compton*, 54th District Court, No. 011545 (Nov. 6, 2018)
- *Compton v. State*, Court of Criminal Appeals of Texas, No. AP-77,087 (Apr. 12, 2023)

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The opinion of the Court of Criminal Appeals of Texas ("CCA") affirming the trial court's judgment is published as *Compton v. State*, 666 S.W.3d 685 (Tex. Crim. App. 2023), and is attached as Appendix A. The court denied rehearing on May 31, 2023. Appendix B.

JURISDICTION

The CCA issued an opinion affirming the judgment of the trial court on April 12, 2023. It denied rehearing on May 31, 2023. On August 18, 2023, Justice Alito granted an application to extend the time for filing a petition for writ of certiorari until September 28, 2023. The Court has jurisdiction to review the CCA's opinion affirming the trial court's judgment pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in relevant part, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Compton, an incarcerated 21-year-old Black man, was accused by Texas of causing the death of a white woman working as a correctional officer in rural Jones County.

A. Trial

Prior to trial, Mr. Compton moved in limine to exclude any evidence offered to establish that his race would make it likely that he would engage in future criminal conduct. 1 CR 149. The court granted the motion, ordering the State to first approach the bench for a ruling on the admissibility of any such evidence. 1 CR 292–93.

Also prior to trial, both Mr. Compton's counsel and the State deposed Mr. Compton's elderly paternal grandmother, who was his caregiver during his adolescence. During cross-examination by the State, the prosecutor inquired into incidents that led to Mr. Compton's involvement in the Arkansas juvenile delinquency system. The following exchange occurred:

> Q Now, one of those fights he got into, he actually attacked a small, white child, correct, a younger white child?
> A He wasn't so young. About the same age. Junior high.
> Q Okay. It would have been – this was, I believe, a schoolyard fight over a basketball?
> A Or football.
> Q Football, okay. But the young boy was a white individual?
> A He said he didn't want n***ers playing with him.
> Q And, in fact, that young man was sent to the hospital, correct, with loose teeth, I believe?
> A I think so, yes.

DX-DA-18 at 147–48. The video deposition was admitted into evidence and played for the jury.

Jury selection began three days after the deposition. By Texas law, each party was given 15 peremptory strikes, which were exercised simultaneously after

qualifying the requisite number of jurors.[1] Although women comprised 55 percent of the pool of qualified jurors from which peremptory strikes were made, the State used 13 of 15—87 percent—of its peremptory strikes to exclude women from Mr. Compton's jury. Texas also struck the only two qualified African American venirepersons, one man and one woman. The State used its remaining strike against a Hispanic man. Thus, Texas exercised every peremptory strike it had against a woman or person of color, resulting in a jury of eight men and four women, none of whom were African American. The complete racial composition of Mr. Compton's jury is unclear from the record because one juror did not answer the question about race on his juror card.[2] Thus, what is known is that Mr. Compton's jury was composed of ten white jurors and one Hispanic juror.

After the parties made their peremptory challenges, the defense objected, alleging the State had discriminated based on race and gender. 21 RR 12. Asked for reasons for its strikes, the State responded it was "entitled to jurors that can follow

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[1] The jurors who sat on Mr. Compton's jury were selected from a pool of 42 panel members questioned by the parties and deemed qualified by the court. 20 RR 184, 194. Four additional prospective jurors were selected without questioning for an alternate pool. 20 RR 194. After exercising their 30 strikes on the pool of 42—two of which were used on the same juror—the defense was given a 16th peremptory strike to use. 21 RR 25. The parties were also each given an additional "alternate strike" for use only in the four-person pool from which two alternate jurors would be chosen. 21 RR 8, 11. That pool contained only white women. Because the alternate jurors were selected from a separate pool that was comprised of prospective jurors who were all the same race and gender, that pool of jurors and the strikes used on them have been excluded from consideration in the analysis in this petition.

[2] The record reflects that this juror was not Black because defense counsel asserted that the State struck the only two Black panel members when she made her *Batson* objection. 21 RR 12. Neither the State nor the trial court contested this assertion. *See* 21 RR 12–21.

the law" and that "[e]very strike we made was based on the fact essentially that these individuals could not consider the full range of punishment." 21 RR 14–15. The State asserted that all three strikes against non-white prospective jurors "were based on their inability to consider the death penalty." 21 RR 15. With respect to its strikes of women, the State asserted that "there was a disproportionate [number] of women that showed up in voir dire." 21 RR. 16. Ultimately, the State explained its overall strike strategy as having been "certainly focused almost single-handily [sic] on the issue of the death penalty." 21 RR 16.

The defense responded that the State's assertion that these jurors could not consider the full range of punishment was untrue, pointing out that the two African American jurors struck by the State indicated they could answer the special issues in a manner resulting in death. 21 RR 17. The defense also pointed out that the State's response was not adequate to explain its strikes against women. *Id*. at 18. The trial court overruled the objection. *Id*. at 19. A jury of eight men and four women with no African Americans on it was seated. The jury convicted Mr. Compton of capital murder. 2 CR 765.

During the sentencing phase, the defense presented substantial evidence of mistreatment and neglect Mr. Compton suffered as a child, including racialized abuse from his own family. Mr. Compton's mother, with whom he lived until age six, is white. 29 RR 33. His father, with whom he never lived until near the time of the offense, is African American. *Id*. Jurors heard substantial testimony about Mr.

Compton's maternal grandfather's racist beliefs against African Americans and his racially abusive behavior toward Mr. Compton as a child.

Specifically, jurors heard testimony from several different witnesses that Mr. Compton's maternal grandfather was "very racist."[3] 33 RR 94, 126. He treated Dillion differently from his white half-brother James and "would call [Dillion] the N-word." 33 RR 94–95, 102. Mr. Compton's grandfather "didn't accept Dillion because he was black." 33 RR 101. Mr. Compton's mother's cousin testified it was a "big deal" when Dillion was born because "[h]e was black. He had a white family that had racists in it." 33 RR 124–125. Due to Mr. Compton's mother's neglect of her children, his maternal grandparents took custody of Mr. Compton's half-brother James, who was white, but his grandfather "didn't want to take Dillion because Dillion was black." 33 RR 126. His grandfather believed Mr. Compton "would be better off with his own kind." 33 RR 175. Jurors also heard expert testimony that the racialized abuse Compton suffered as a child from his family severely traumatized Mr. Compton and led to a profound sense of rejection that contributed to his mental health and behavioral problems as an adolescent. 37 RR 50, 55, 57, 68, 96. The defense offered the testimony as evidence of Mr. Compton's background for the jury to consider when deliberating whether mitigating circumstances were sufficient to warrant a life sentence.

To sentence Mr. Compton to death, the jury had to, inter alia, "find from the evidence beyond a reasonable doubt that there is a probability that [Mr. Compton]

[3] Mr. Compton's maternal uncle Lonnie Compton testified that his grandfather wanted there to be a holiday called "national kill a n***er day." 33 RR 188.

would commit criminal acts of violence that would constitute a continuing threat to society." 2 CR 811. During closing argument at sentencing, the prosecutor urged the jury that it had met its burden of proof, pointing to three "indicators of future danger." 38 RR 41–44. The prosecutor told the jury that the third "major indicator" of future danger "is the fact that [Mr. Compton] cannot, will not accept responsibility for what he does. He blames everybody else." 38 RR 43–44 (emphasis added). In support of this argument, the Texas government told the jury:

> Over and over and over we see this same MO played out by the Defendant from the time he was in junior high to now. He gets in trouble, he gets caught, he blames others. He lies and lies until he's cornered. He deflects responsibility. He claims he is the victim. And he gets really mad at those that are calling him out on those lies and those behaviors, and when that doesn't work *he starts playing the race card. "You're just picking on me just because I'm black."*

38 RR 44 (emphasis supplied). No objection was made by defense counsel. Although the jury deliberated at length as to sentencing, it ultimately determined Mr. Compton would probably be a danger in the future and that mitigating circumstances did not warrant life in prison without parole rather than death. 2 CR 811.

B. Appeal

On appeal to the CCA, Mr. Compton asserted that the prosecution's exercise of its peremptory strikes based on race, ethnicity and gender violated the Fourteenth Amendment to the United States Constitution. Mr. Compton urged below that the State's objective during voir dire was to seat a jury comprising as many white men as possible to judge Mr. Compton's guilt and determine his sentence. To accomplish that, it discriminated against non-white jurors and women in its use of peremptory strikes.

Mr. Compton argued that (1) the State's pattern of strikes—both against nonwhite jurors and against women—created a strong inference of discrimination; (2) the State's proffered race- and gender-neutral reasons for its strikes were not supported by the record; (3) the State engaged in disparate treatment by accepting white male jurors who were less favorable to the death penalty—the State's purported reason for its strikes—than jurors it struck; (4) the State engaged in disparate questioning designed to encourage non-white and female prospective jurors to express hesitation about imposing death, while failing to inquire into similar conflicted feelings of their white male counterparts; and (5) the State's explanation that a disproportionate number of women showed up for voir dire cannot explain its strikes.

An analysis of the circumstantial evidence available in the case to ascertain whether the prosecution's asserted rationale of single-minded focus on the death penalty is pretextual should begin with the State's strike of female prospective juror Victoria Proctor. Ms. Proctor was so pro-death penalty in her views that the defense also exercised a strike against her.[4] She strongly favored the State on the death penalty,

[4] Ms. Proctor was the only prospective juror "double struck" by the parties. A defense exercise of a strike against a prospective juror does not, however, negate the evidentiary import of the State's exercise of a strike against that same juror on the question of discriminatory intent. Instead, the focus of a *Batson/J. E. B.* analysis is "solely on evidence concerning the *prosecutor's* exercise of peremptory challenges at the defendant's trial." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (emphasis added); *see also Miller-El v. Dretke* , 545 U.S. 231, 254 n.14 (2005) ("Miller–El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks."*)*; *Beasley v. United States*, 219 A.3d 1011, 1016 (D.C. 2019) (State's strikes against two Black jurors were relevant to determination of whether defense established prima facie case of discrimination at *Batson's* first step, even where defense also struck those same jurors). Particularly here, where the State's purported reason for its strikes was prospective jurors' positions on the death penalty, the State

ranking herself a five out of six in terms of the strength of her support for capital punishment on a questionnaire. 14 CR 5911. She described herself in the questionnaire as "in favor of capital punishment, except in a few cases where it may not be appropriate." *Id*. She expressed that she had no religious, moral, or ethical consideration that would prevent her from returning a verdict that resulted in the execution of another human being. 14 CR 5907. She endorsed punishment as a more important objective than rehabilitation when sentencing a person for violent offenses. 14 CR 5912. She agreed that capital punishment was "absolutely justified," a sentence "[w]e must have … for some crimes," and that it was "just and necessary." *Id*. She disagreed with the propositions, "Capital punishment is not necessary in modern civilization;" "Life imprisonment without parole is more effective than capital punishment;" and "Capital punishment is justified only for premeditated murder." *Id*.

Asked on a questionnaire how she felt about a person receiving a death sentence for intentionally killing a person employed in the operation of a penal institution (the charged allegations in this case), Ms. Proctor wrote, "I would have to say that I would support it." 14 CR 5913. Asked how she felt about life imprisonment for a person convicted of capital murder, she wrote, "It sometimes concerns me

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would be likely to strike jurors the defense sought to keep on the jury. Thus, a defense exercise of a strike against a prospective juror is strong evidence—perhaps the strongest evidence possible—of that juror's favorability to the State on the issue it claimed was most important to it in jury selection. Moreover, because "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process," *J. E. B.*, 511 U.S. at 140, a non-discriminatory defense strike against a juror should not moot a challenge to the State's discriminatory exercise of a strike.

particularly in very heinous crimes. Sometimes the prisoner continues to do harm to others while in prison." 14 CR 5914. She answered that she believed mitigation evidence to be "not important," 14 CR 5914, and that the death penalty was used in Texas "an appropriate amount," 14 CR 5916.

During individual questioning, Ms. Proctor did not express any reservations about imposing death. When the prosecutor questioned her regarding the special issues, she responded that she did not like reading the mitigation special issue "because some of the things I hear I get angry with." 17 RR 157. Asked by the defense what she meant by that, she answered, "I think some people use just whatever—you know, they blame—I don't like the blame game." 17 RR 180. She further explained, "Because you hear it too much and because I don't think it's a good excuse for everything, but I do know the effect that it can have on people." 17 RR 181.

The State also struck female venireperson Beverly Burkman. She was a favorable potential juror for the State on the death penalty. On her questionnaire, she ranked herself as a four out of six in terms of her support for capital punishment. 13 CR 5602. She stated that no religious, moral, or ethical consideration would prevent her from returning a verdict that resulted in the execution of another human being. 13 CR 5598. She endorsed a belief that in sentencing violent offenders, punishment was more important than rehabilitation. 13 CR 5603. Although she endorsed that she was "neither generally opposed nor generally in favor of capital punishment," 13 CR 5602, she agreed with the propositions, "Capital punishment is absolutely justified;" "We must have capital punishment for some crimes;" "Capital punishment is just and

necessary;" and "Capital punishment should be available as punishment for more crimes than it is now." 13 CR 5603. She disagreed with the propositions, "Capital punishment is not necessary in modern civilization;" "Life imprisonment without parole is more effective than capital punishment;" "Execution of criminals is a disgrace to civilized society;" and "Capital punishment is justified only for premeditated murder." *Id.*

Asked her opinion about the death penalty for a person who intentionally kills someone employed in the operation of a penal institution, she answered, "The person has taken at least one life possibly two. They should probably receive the death sentence." 13 CR 5604. Asked why she felt that way, she answered, "The person would probably never be rehabilitated." *Id.* She felt life imprisonment without parole for a person convicted of capital murder might be appropriate "[i]f the criminal is already close to death." 13 CR 5605. Asked her opinion about how relevant mitigating evidence would be to deciding punishment for capital murder, she answered, "It's not." *Id.*

After explaining the special issues during Ms. Burkman's individual voir dire, the prosecutor asked if she had any concerns about answering them. 15 RR 153. Ms. Burkman responded, "No, sir." *Id.* The prosecutor replied, "Okay. I didn't think so. . . . You know, the answers you gave really I'm not surprised by them because they really are consistent with what you said in your questionnaire." *Id.* The prosecutor remarked her answers on the questionnaire were "consistent throughout." *Id.* The prosecutor then briefly ran through a few answers from her questionnaire, clarifying that

she would not require the State to prove that the defendant had previously committed a murder. 15 RR 155. The State did not challenge Ms. Burkman for cause.

The State also struck female prospective juror Lee-Ann Cummings. On her questionnaire, Ms. Cummings ranked herself as a four out of six in terms of her support for capital punishment. 12 CR 5022. She endorsed, "I am in favor of capital punishment, except in a few cases where it may not be appropriate." *Id.* She confirmed that she had no religious, moral, or ethical consideration that would prevent her from returning a verdict that resulted in the execution of another human being. 12 CR 5018. She endorsed a belief that punishment was a more important objective than rehabilitation when sentencing for violent offenses. 12 CR 5023. She agreed with the propositions, "Capital punishment is absolutely justified;" "We must have capital punishment for some crimes;" "Capital punishment is just and necessary;" and "Capital punishment gives the criminal what they deserve." *Id.* She disagreed with the propositions, "Capital punishment is not necessary in modern civilization;" "Life imprisonment without parole is more effective than capital punishment;" and "Execution of criminals is a disgrace to civilized society." *Id.*

In response to the questionnaire question regarding how she felt about a person receiving a death sentence for the intentional killing of a person employed in the operation of a penal institution, Ms. Cummings wrote that it would be hard to say any person deserved to die, but "I am leaning toward an agreeance with capital punishment once proven guilty." 12 CR 5024. She answered that she believed mitigation evidence to be "completely irrelevant" because "[b]eing in a lot of pain <u>never</u> justifies

causing pain to others." 12 CR 5025 (emphasis in original). She believed the death penalty was used in Texas "an appropriate amount." 12 CR 5027.

During questioning, the prosecutor raised a concern about Ms. Cummings's questionnaire response that serving in a capital case would weigh on her. 13 RR 82. She answered that if she reached a verdict unanimously with 11 other jurors, she would not be able to stop thinking about it but would move on. *Id.* The prosecutor did not inquire further. The State did not challenge Ms. Cummings for cause.

The State struck Black female prospective juror Sarah Boyd. Ms. Boyd's questionnaire reflected support for use of the death penalty on balance. She endorsed, "I am opposed to capital punishment, except in a few cases where it may be appropriate." 10 CR 4021. Her subsequent answers, described below, indicated that the allegations against Mr. Compton made his case the type for which she would be in favor of the death penalty. Asked her feelings about the death penalty, she wrote, "I don't feel too strongly against it, but I'm not against it." *Id.* She rated herself as a three out of six in terms of her support for the death penalty. *Id.* Asked what purpose she thought the death penalty served, she wrote, "To punish individuals who are a continuous threat to society [to] prevent them from harming others." *Id.* Ms. Boyd also endorsed her belief that punishment rather than rehabilitation was the more important objective in sentencing violent criminal offenses. 10 CR 4022.

On her questionnaire, Ms. Boyd agreed with the propositions, "We must have capital punishment for some crimes," and "Capital punishment is just and necessary." *Id.* Asked an open question about her opinion on the death penalty for a person who

is guilty of capital murder for the intentional killing of a correctional officer, Ms. Boyd wrote, "I believe it is fair, because the victim doesn't deserve to die in a senseless manner. They deserve a fair chance at life. Nobody wants to die or anticipates it each morning they wake up." 10 CR 4023. Her questionnaire reflected she had a cousin who worked as a correctional officer. 10 CR 4019. Asked an open question about her opinion of the relevance of mitigating information when making a sentencing decision, she wrote, "The information is somewhat irrelevant even though it may have led up to the events that took place. The evidence of the current case is more important." 10 CR 4024. She endorsed a belief that the death penalty was used "an appropriate amount of time" in Texas. 10 CR 4026. Finally, asked an open question about why she did or did not want to be a juror, she wrote, "I don't have a firm set of beliefs leaning towards or against the death penalty. I believe life imprisonment is fair enough, but I will vote for the death penalty if there is enough evidence presented." 10 CR 4027.

During individual questioning, Ms. Boyd repeatedly described herself as being "indifferent" and neither for nor against the death penalty. 7 RR 194, 201. She "didn't really like" the death penalty and would not have it if she were "queen of Texas." 7 RR 194–95. She said, however, that she would be in favor of the death penalty if a murder were intentional or knowing and if it were really brutal or violent. 21 7 RR 195, 220–21. Asked whether she could vote for a death sentence, Ms. Boyd answered, "I could. I could vote for it or I would vote for it." 7 RR 199. She said she would not have any "second guesses" about doing so. 7 RR 200. After explaining the special

issues, the prosecutor asked whether she thought she could follow this law, and Boyd responded, "Yes." 7 RR 208. The State challenged Ms. Boyd for cause but was overruled. 7 RR 225–29.

The State struck Hispanic male prospective juror Catarino Macias. Mr. Macias self-identified as pro-death penalty: "I am in favor of capital punishment, except in a few cases where it may not be appropriate," rating the strength of his support as four out of six. 10 CR 4039. He endorsed he had no "religious, moral, or personal beliefs that would prevent [him] from returning a verdict which would result in the execution of another human being." 10 CR 4035. Asked what purpose he thought the death penalty served, he wrote, "To show others that justice will be served and show the justice system how it works and warn others." 10 CR 4039. He believed that in sentencing violent offenders, punishment was a more important objective than rehabilitation. 10 CR 4040. He agreed with the propositions, "Capital punishment is absolutely justified;" "We must have capital punishment for some crimes;" and "Capital punishment is just and necessary." *Id.* He disagreed with the propositions, "Capital punishment is not necessary in modern civilization;" "Execution of citizens is a disgrace to civilized society;" and "Capital punishment is justified only for premeditated murder." *Id.* He believed the death penalty was used in Texas an appropriate amount of time. 10 CR 4044.

During individual questioning, Mr. Macias agreed with a leading question that he was "on the fence" about how he felt about the death penalty, qualifying "more or less." 7 RR 235. He said he would just have to go with the evidence. *Id.* He testified

there was no possibility that any personal feelings would keep him from imposing a death sentence. 7 RR 249. In response to prosecution questioning invoking his Catholic faith, *see infra*, he testified that if the Catholic church were against the death penalty, he would "probably" be against it, too. 7 RR 251. He expressed a belief that everybody deserves a second chance, 7 RR 250, 259, but he repeatedly stated neither that nor the Pope's opposition would prevent him from answering the special issues in a manner that would return a death verdict, 7 RR 263, 266. The State did not challenge Mr. Macias for cause.

1. The State Accepted White Male Jurors with Views Less Favorable to It Than Those It Struck.

Mr. Compton argued below that the State accepted white male venirepersons who expressed views on the death penalty as or less favorable to it than the venirepersons it struck. Venireperson Peter Klein, a white man the State did not strike and thus accepted as a juror on Mr. Compton's jury,[5] expressed views less supportive of the death penalty than every person the State struck. Mr. Klein endorsed on his questionnaire that he was opposed to the death penalty except in some cases, a position equal to or less supportive of the death penalty than all struck venirepersons. 12 CR 5256. Asked about any religious, moral, or personal beliefs that would prevent him from returning a verdict which would result in the execution of another human

[5] The defense exercised a peremptory strike against Mr. Klein, so he did not actually sit on the jury. However, because the parties provided their complete list of strikes to the court at the end of individual voir dire, 21 RR 7–8, the record is clear that the State would have accepted Mr. Klein onto Mr. Compton's jury had the defense not struck him. Thus, Mr. Klein's views on the death penalty are relevant to whether that State's purported reason for its peremptory strikes was genuine.

being, Mr. Klein wrote that he was "very conflicted." 12 CR 5252. Asked his feelings about the death penalty, Mr. Klein wrote, again, "Very conflicted," underlining "very" for emphasis. 12 CR 5256. Asked on the very next question what purpose he thought the death penalty serves in society, he wrote, "See above," emphasizing a third time his personal conflict about the death penalty. *Id.* He further expressed on his questionnaire that he "waiver[s]" on the death penalty because of fears of convicting an innocent person. 12 CR 5258. Mr. Klein endorsed that he believed life without parole was a "[h]arsher punishment that is not as permanent" as a death sentence. 12 CR 5259.

Whereas Mr. Klein agreed with the proposition on the questionnaire that "Capital punishment is not necessary in modern civilization," 12 CR 5257, every individual struck by the State disagreed with it. While Mr. Klein embraced the proposition, "Execution of criminals is a disgrace to civilized society," *id.*, every individual struck by the State but one disagreed with it.[6] Mr. Klein disagreed with the proposition, "Capital punishment is just and necessary," *id.*, while all venirepersons described above who were struck by the State agreed with it.[7] And whereas Mr. Klein disagreed with the proposition, "Capital punishment is absolutely justified," *id.*, struck prospective jurors Proctor, Macias, Cummings, and Burkman agreed with it.[8]

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[6] Female prospective juror Zola Bivens agreed with it.

[7] Four additional prospective jurors struck by the State also agreed with it (Mathis, DeHoyos, Lytle, and Barbee).

[8] Three additional prospective jurors struck by the State also agreed with it (Davis, Mathis, and Manske).

Further, Mr. Klein endorsed a belief that the death penalty was used "too often" in Texas. 12 CR 5261. None of the individuals struck by the State shared that opinion. All either believed the death penalty in Texas was used too seldom, an appropriate amount of time, or did not know. Mr. Klein left blank his answer to the question whether punishment or rehabilitation was the "more appropriate objective" in sentencing violent offenders, but all of the above-described prospective jurors struck by the State endorsed a belief that punishment was the more appropriate objective. Mr. Klein denied during questioning that he was anti-death penalty, but he did not deny that he was conflicted about the death penalty and that his position had "softened" from what it had been in the past. 14 RR 62.

Venireperson Douglas Vinson, a white man the State did not strike and who sat on the jury, also expressed views on the death penalty that were equal or less favorable to the State than did many of those it struck. On his questionnaire, Mr. Vinson endorsed, "I am neither generally opposed nor generally in favor of capital punishment," 14 CR 6181, a position less supportive of capital punishment than struck venirepersons Proctor, Macias, and Cummings and equally as supportive as Burkman.[9] He expressed that the death penalty was used in Texas an appropriate amount of time, 14 CR 6186, a position weaker than struck jurors Proctor, Macias, and Cummings and equivalent to Burkman. Mr. Vinson also expressed conflict about

[9] Struck venirepersons Macias, Williams, Proctor and Cummings also expressed a more supportive position while struck venirepersons Davis, Mathis, Burkman, DeHoyos, and Barbee expressed an equally supportive position.

the death penalty on his questionnaire, indicating that he did not want to be on the jury because "[i]t would be hard." 14 CR 6187.

During questioning, Mr. Vinson confirmed that imposing a death sentence would be very difficult for him. Asked by the prosecutor whether there was any concern that his personal feelings about the death penalty might interfere with his ability to make a decision on the evidence, he answered, "I would like to say it wouldn't—wouldn't change my mind, but I—I don't know. It—it's going to be a hard—a hard decision, you know, to put . . . somebody's life on the line." 19 RR 30. Asked again about whether he would be able to "pull that trigger" and vote for a death sentence, he answered, "It's still just a hard question for me. I mean, I really don't know how to put it in words. Just—I think I could, you know, vote on the death penalty and everything, but I still think it would be—I mean, it's going to have to be, you know, really overwhelming evidence and everything." 19 RR 32. He then added, "To be truthful, I don't really know whether I could—could do it." *Id*. He expressed he would not want to have tell his grandchildren that he helped put somebody to death. 19 RR 33. The conflict Mr. Vinson expressed about his ability to impose a death sentence far exceeded any of the individuals described above whom the State struck.

2. The State Engaged in Disparate Questioning.

Mr. Compton further argued on appeal that Texas had engaged in disparate questioning of jurors that was designed to encourage non-white and female venirepersons to express hesitation about imposing death, while failing to inquire into similar conflicted feelings expressed by white, male venirepersons. First, in an effort to

pressure non-white and female panelists into giving answers that would be disqualifying, the State used a questioning technique to emphasize Mr. Compton's humanity. The script generally involved pointing to Mr. Compton in the courtroom and asking the venireperson to agree that he is a "human being," one who eats, sleeps, and has family "like the rest of us." *See, e.g.,* 17 RR 216. When asked about their ability to follow the law on the special issues, the non-white and female venirepersons the State questioned were more likely to receive the "humanity script" than similarly situated white men.

The State pursued this line of questioning 14 times by Mr. Compton's count. Of the prospective jurors receiving the script, 11 were women and only three were men. One of those men was Mr. Macias, a Hispanic man the State targeted for disqualification. 7 RR 266. Of the women against whom this tactic was deployed, only five were successfully challenged for cause. Six were peremptorily struck. 20 RR 163. None of the white men who expressed serious conflict about the prospect of sentencing a person to death (e.g., prospective jurors Klein and Vinson) were given the humanity script to ratchet up their expressed inner conflict.

The State also selectively invoked the religion of non-white and female venirepersons in order to encourage expressions of inner conflict. Struck Hispanic venireperson Macias, whose questionnaire was unambiguously pro-death penalty, wrote on his questionnaire that he was Catholic. Although Mr. Macias had not expressed any conflict, including any religious conflict, about the death penalty or his ability to impose it on his questionnaire or in his voir dire, the prosecutor asked Mr. Macias

whether his "personal conflict" might interfere with his ability to keep an open mind on the evidence. 7 RR 248. Mr. Macias answered bluntly, "No." 7 RR 249. The prosecutor immediately tried again, and received the same response:

> MR. CHOATE: So, with that said, is—and I know you answered—let me ask it again and maybe I'll ask the question better, but is that a possibility for you that you would not be able to impose the death penalty because of your personal feelings?
> VENIREPERSON MACIAS: No.

Id.

Having failed to manufacture a personal conflict, the prosecutor took a different tack, invoking Mr. Macias's Catholic faith.

> MR. CHOATE: . . . I noticed, by the way, that you were Catholic.
> VENIREPERSON MACIAS: Right.
> MR. CHOATE: And I noticed that there's a question about what is your—how does your church feel about the death penalty?
> VENIREPERSON MACIAS: Yes.
> MR. CHOATE: And you said you didn't know.
> VENIREPERSON MACIAS: Correct?
> MR. CHOATE: Well, would it make a difference to you if I told you three weeks Pope Francis came out and said the Catholic Church is against the death penalty?

7 RR 250. Although Mr. Macias was uninformed about the Catholic Church's or the Pope's position on the death penalty, the prosecutor educated him in order to bring religious pressure to bear and generate internal conflict within him about the death penalty.

> MR. CHOATE: It's not—from the Catholics I know and I talk to they tell me, "What the Pope says is what we're supposed to believe. What we're supposed to do," and, you know, certainly just a few weeks ago the Pope has said he is against the death penalty and the Catholic Church does not support the death penalty.
> VENIREPERSON MACIAS: Right.

> MR. CHOATE: As someone who is already conflicted now we've got the Pope telling you, you should not be supporting the death penalty. How does that play into it?
>
> VENIREPERSON MACIAS: You got a point. I don't know.
>
> MR. CHOATE: And I don't mean to put you on the spot.
>
> VENIREPERSON MACIAS: No, you're fine.
>
> MR. CHOATE: Religion means a lot to us.
>
> VENIREPERSON MACIAS: Yeah.

7 RR 251. The prosecutor eventually induced Mr. Macias to say that if the Catholic Church was against the death penalty, "I'd probably be against it." *Id*. He then led him to say that, due to this, this case would probably not be "the right jury" for him to sit on:

> MR. CHOATE: . . . And with that said, do you think this is the right jury for you to sit on?
>
> VENIREPERSON MACIAS: I don't think so.
>
> MR. CHOATE: I know you're a fair man, and, frankly, you look like the kind of person I would love on a jury, but I don't want you [sic] to put you in that moral quandary.
>
> VENIREPERSON MACIAS: Yeah.
>
> MR. CHOATE: I'm going to pass the juror at this time.

7 RR 252.

In response to defense counsel's questioning, Mr. Macias was unambiguous about his support for the death penalty notwithstanding the Catholic Church's position. He testified he could answer the future dangerousness special issue based on the evidence without regard to his religion. 7 RR 259, 261. He testified he would be able to consider both life without parole and the death penalty "even though the Pope has said [I] should be against" the death penalty. 7 RR 262.

The prosecutor would not give up. Armed on redirect with a news article about the Pope's stance on the death penalty, he quoted it to Mr. Macias and invoked his "loyalty" to the Church:

> MR. CHOATE: And I apologize, but you told us—August 2nd, just literally August 2nd, it [sic] a few weeks ago, the headlines in the New York Times Pope Francis Declares Death Penalty Unacceptable In All Cases. Article says, "Pope Francis declared that the death penalty in all cases, a definitive change in church teaching." And then let's see. It says that Pope Francis said, "Executions were unacceptable in all cases because they are an attack on human dignity." Okay? So that's what is being reported.
>
> VENIREPERSON MACIAS: Right.
>
> MR. CHOATE: You haven't heard that but you're loyal to the Catholic Church. I think the question is this—and I don't—Mr. Propst didn't—or can you be honest? Can you not be honest? We all agree you're honest. We just know this is a difficult scenario.
>
> VENIREPERSON MACIAS: Yes.

7 RR 263–64. After additional badgering about his religion and invocation of the humanity script, Mr. Macias was again unequivocal:

> MR. CHOATE: You could actually vote for the death penalty?
>
> VENIREPERSON MACIAS: Yes.
>
> MR. CHOATE: The Pope has said this is an attack on every person's dignity. There's Dillion Compton sitting there. Human being.
>
> VENIREPERSON MACIAS: Right.
>
> MR. CHOATE: Just like the Pope said. Eats like us; family like us; tired like us; emotions, happy, said, all of those feelings like us. Can you look at him and say you would vote for the death penalty?
>
> VENIREPERSON MACIAS: Yes.
>
> MR. CHOATE: Can the victims of the—the family of the victim that would be sitting out here could they count on you, assuming everything else, to vote—to separate what you believe as a Catholic and vote for the death penalty?
>
> VENIREPERSON MACIAS: Yes.

7RR 265–66. Although it is apparent the prosecution was trying to disqualify Mr. Macias through its religious-based questioning, its efforts were so unsuccessful—

largely because Mr. Macias was, in fact, quite pro-State and pro-death-penalty—that it did not even challenge him for cause.

Struck African American female venireperson Boyd was subjected to a similar tactic. Asked on her questionnaire to list two men and two women in public life whom she admired, Ms. Boyd wrote that she admired Martin Luther King, Jr., and Nelson Mandela. 10 CR 4016. After Ms. Boyd told the prosecutor on voir dire that she was "kind of indifferent" and "not really for [] or against" the death penalty, the prosecutor tried to exploit her questionnaire answers and educate her about Rev. King, Jr.'s and Mandela's anti-death penalty beliefs:

> MR. CHOATE: You mentioned the two men that you most publically [sic] admire are Martin Luther King and Nelson Mandela. Those are two individuals that weren't for the death penalty or do you know?
> VENIREPERSON BOYD: No, I'm not sure. I don't know.
> MR. CHOATE: Okay. If somehow you came—found out that maybe they were would that affect your opinion one way or another?
> VENIREPERSON BOYD: No, it wouldn't.

7 RR 201–02.

By contrast, white male prospective jurors who expressed inner conflict or less support for the death penalty than those struck by the State were not subjected to such manipulative tactics. For example, the State asked venireperson James Tyson, a white man it accepted onto the jury, "just a curiosity question" about his prior opposition to the death penalty that he expressed on his questionnaire. 17 RR 72. Mr. Tyson said he had a religious upbringing that imparted objections to use of the death penalty, stating that the death penalty is "fine for other people, but for myself I would choose not to." *Id.* Unlike its treatment of prospective juror Macias, however, the

prosecutor did not bring any religious pressure to bear on Mr. Tyson, nor did it give him the humanity script. Instead, it encouraged Mr. Tyson to set aside his expressed discomfort and do his civic duty:

> MR. BRIDGES: Okay. Now, you say you do not want to be a juror?
> VENIERPERSON TYSON: Not particularly, no.
> MR. BRIDGES: And I understand that, but you would agree with me that as American citizens one of the most important duties that we do is, well, in my opinion, is vote and serve jury duty because the fact is, is if any of us were on the victim's family or on the Defendant's side we definitely would want twelve fair, impartial jurors and we have to have those twelve people. Does that make sense?
> VENIREPERSON TYSON: Yes.
> MR. BRIDGES: Although you don't want to do it you would agree to be fair and follow the law as given to you by the Court?
> VENIREPERSON TYSON: Yes. I see it too as my civic duty, I just—prefer not to.
> MR. BRIDGES: Yeah, I understand. [] So do you have any religious concerns or do you think that would make you feel uncomfortable in judging another person?[10]
> VENIREPERSON TYSON: No.
> MR. BRIDGES: Okay. Good. Thank you so much. The State passes the witness, Your Honor.

17 RR 73–74.

The State also handled white male venireperson Douglas Vinson's expressed conflict about the death penalty far differently from how it treated similar views expressed by those it struck. Notwithstanding that Mr. Vinson expressed as much or more personal conflict about the prospect of imposing a death verdict than all the struck venirepersons—expressing concern about whether he could impose the death penalty and about having to tell his grandchildren that he played a role in sentencing

[10] In the transcript this question appears as having been asked by Mr. Tyson, but it is clear from the context it is a question from the prosecutor put to Mr. Tyson.

a human being to die—the prosecutor did not question him in a manner designed to encourage him to disavow service. He was not given the humanity script and was never asked whether this "just wasn't the jury for him." Instead, the prosecutor sought to reassure Mr. Vinson that he could serve notwithstanding his serious reservations:

> MR. CHOATE: . . . Can you set aside how you feel personally about worries about having to tell your grandkids what you did?
> VENIREPERSON VINSON: Yeah.
> MR. CHOATE: We're all going to have to answer that—for that.
> VENIREPERSON VINSON: Yeah.
> MR. CHOATE: I'll have to tell my kids, you know, right? But—but that's all we can ask of a juror. You know, when that moment comes, can you follow the law? Can you evaluate the evidence and make that decision based on that?
> VENIREPERSON VINSON: Yes, sir.

19 RR 39.

3. The State Gave a False Explanation for Why It Struck So Many Women.

Mr. Compton also pointed out that the government's explanation to the trial court that it struck a disproportionate number of women because a disproportionate number of women showed up in voir dire could not explain its strike pattern. The State told the trial court that it may have struck so many women because "a disproportionate [number] of women . . . showed up in voir dire." 21 RR 16. Whatever the proportion of women making up the entire venire, there was only a slight disproportion in the pool of 42 qualified jurors from which the parties made peremptory strikes. Women represented 55 percent of the qualified venire and men 45 percent. But the

State's strike rate against female venirepersons—87 percent—far exceeded that slight disproportion and cannot explain the pattern.

C. Decision Below

The CCA affirmed Mr. Compton's judgment. As to discrimination in jury selection, the court failed to analyze the issue wholistically as it had been presented, instead breaking up the claim into discrete issues of race and gender. With respect to race, the court below analyzed each of the three struck non-white jurors individually, but it did so in isolation and without reference to or consideration of the State's broader conduct. It concluded that the government had not discriminated in the exercise of its peremptory strikes because the "totality of the record supports the genuineness of the State's explanation that it struck [each] prospective juror[] based on their perceived personal moral reservations about the death penalty" and there was "no basis in the record" for concluding the asserted justification was pretext. App. A at 31–32.

The CCA separately held, in truncated fashion, that the State had not discriminated based upon gender in the exercise of its strikes. Unlike its analysis for whether race discrimination occurred, the CCA did not scrutinize each strike the State made against women. It called the statistical evidence showing heavily disparate strikes against women "concerning" but not definitive. *Id*. at *32–*33. It held there was "no evidence" of discriminatory disparate questioning based on gender, concluding that "any additional questioning of the State-stricken female venirepersons regarding their personal views on the death penalty constituted a justifiable attempt by the

State to follow up on potentially unfavorable answers that had already been provided." *Id*. at *33. Finally, and explicitly "without engaging in an exhaustive comparative analysis of each prospective juror," it held that "the State was, in fact, focused on death-penalty issues" and that it "struck ***most*** of the female venirepersons based on their responses indicating personal reservations about that punishment option." *Id*. at *33–34 (emphasis supplied). Thus, the CCA affirmed without drawing any conclusion about whether the State exercised any given peremptory challenge based upon gender and without analyzing whether the State's purported reason for its peremptory strikes explained the strike of each woman removed by the State.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to enforce the Constitution's guarantee against state-sponsored racial and gender discrimination in the jury system.

I. The Texas Court Failed to Give Meaningful Consideration to "All Relevant Circumstances" Bearing on Whether the State Exercised Its Peremptory Strikes in a Discriminatory Manner Based on Race or Gender and Failed to Adjudicate Whether Gender Substantially Motivated any of the State's Strikes.

A State may not discriminate on the basis of race or gender when exercising peremptory challenges against prospective jurors in a criminal trial. *Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994). "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J. E. B.*, 511 U.S. at 140. Relevant factors to consider when evaluating whether improper discrimination occurred include:

- statistical evidence about the prosecutor's use of peremptory strikes against the targeted protected class of prospective jurors as compared to prospective jurors outside the protected class;
- evidence of a prosecutor's disparate questioning and investigation of prospective jurors inside and outside the targeted protected class;
- side-by-side comparisons of prospective jurors in the targeted class who were struck and prospective jurors outside the targeted class who were not struck;
- a prosecutor's misrepresentations of the record when defending the strikes during the hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of improper discrimination.

Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019). Importantly, "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Id.* (citing *Foster v. Chatman*, 578 U.S. 488, 499 (2016)).

With respect to the challenged women, the CCA recognized that at trial "the State provided gender-neutral reasons for its peremptory strikes against the female venirepersons—each individual struck by the State expressed more concern, hesitation, or opposition to imposing the death penalty than those venirepersons the State chose not to strike"—and that its task was to "examine the record under the *Flowers* factors to determine whether the State's expressed reasons were pretextual." App. A at *32. But the court below did not follow through. It ultimately rested its decision on its perception that women were *in general* less favorable on the issue of the death penalty than were men. The court failed to take the next step to whether, despite that, the record supported the State's purported reason for each struck female juror or whether the record revealed that the State's reason was pretext for discrimination with regard to any of the individual struck jurors.

First, the state court acknowledged the statistical disparity in the State's strike rate between women and men, finding it to "raise concerns" but not to be conclusive. App. A at *32–*33.

Second, the state court determined there had not been any disparate questioning of women without any mention of the specific kinds of disparate questioning Mr. Compton had set forth in his brief. The court concluded that "any additional questioning of the State-stricken female venirepersons regarding their personal views on the death penalty constituted a justifiable attempt by the State to follow up on potentially unfavorable answers that had already been provided." App. A at *33. It was silent, however, about the import of the State's *non*-questioning of similarly situated white men who had expressed potentially unfavorable answers regarding their personal views on the death penalty, which is what Mr. Compton pointed to as evidence of disparate questioning.

Third, and perhaps most problematically, the state court purported to conduct "side-by-side comparisons of stricken and accepted venirepersons," but in doing so it simply drew a generalization about the struck women as a whole and compared it to a generalization about all the jurors who were not struck as a whole, concluding that "nearly all," "most," or "some" of the women the State struck expressed particular views about the death penalty not favorable to the State and that those not struck by the State "generally expressed more favorable views towards the death penalty and less favorable views towards the life-without-parole option and mitigating evidence than did the female venirepersons described above." App. A at *34.

Side-by-side comparisons of individual struck jurors with non-struck jurors provide powerful evidence into the validity of the State's purported reasons for a peremptory strike. *Miller-El v. Dretke* , 545 U.S. 231, 241 (2005). This disparate treatment analysis is critical to enforcing the "basic equal protection point" that this Court has repeatedly stressed: even one improper discriminatory strike "is one too many[.]" *Flowers*, 139 S. Ct. at 2241, 2243. Group-level scrutiny is simply inadequate to adjudicate the question of whether the State struck any female juror on the basis of gender. Mr. Compton did not have to show that *all* the State's strikes against women were substantially motivated by an improper factor, just that the State operationalized an improper consideration in a way that at least one strike was substantially motivated by it. The CCA effectively raised Mr. Compton's burden, requiring him to show that the State's substantial motivation for striking all thirteen women was gender.

Scrutiny of the CCA's reasoning demonstrates why its analysis is inadequate to ensure no prospective juror is struck on the basis of race or gender. Even with regard to jurors who answered some questions in a manner less supportive of the death penalty, the State struck a higher percentage of women than men who gave the same answers unfavorable to the State, providing strong evidence of disparate treatment. Additionally, at the individual level, to demonstrate the CCA was incorrect that "each individual struck by the State expressed more concern, hesitation, or opposition to imposing the death penalty than those venirepersons the State chose not

to strike," App. A at *32, one need only examine struck female prospective juror Proctor.

In its first generalization, the CCA observed that "[m]ost of the State-stricken female venirepersons rated themselves a three or four on a scale of one-to-six when asked about their support for the death penalty."[11] App. A at 34. Ms. Proctor, however, rated herself a five out of six in terms of the strength of her support for capital punishment. 14 CR 5911. Eleven of the qualified jurors rated themselves a five—eight men and three women.[12] The State struck 0% of the men and 66% of the women (including Ms. Proctor).[13] Three male venirepersons accepted by the State rated themselves *lower* than Ms. Proctor.[14] Moreover, the State struck 40% of the men who rated themselves as less than five, but struck 77% of the women who did so.

The CCA's second generalization observed that "[m]ost [State-stricken female venirepersons] said they were generally opposed to the death penalty except in a few cases, or that they were neutral on the appropriateness of the death penalty."[15] App.

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[11] This refers to Question 90 on the questionnaire filled out by prospective jurors.

[12] Male venirepersons who rated themselves a five were: Mr. Tittle, 10 CR 4219; Mr. Butler, 10 CR 4237; Mr. Scifres, 11 CR 4605; Mr. Sellers, 11 CR 4641; Mr. Gambrell, 11 CR 4677; Mr. Kershman, 12 CR 5076; Mr. Garcia, 12 CR 5274; Mr. Boone, 13 CR 5403; and Mr. Tyson, 13 CR 5836. Female venirepersons who rated themselves a five were: Ms. Hershey, 13 CR 5421; Ms. Porter, 13 CR 5530; and Ms. Proctor, 14 CR 5911.

[13] The State struck Ms. Hershey and Ms. Proctor.

[14] Mr. Acosta, 10 CR 3895; Mr. Klein, 12 CR 5256; and Mr. Mayfield, 14 CR 6325.

[15] This refers to Question 91 on the questionnaire filled out by prospective jurors.

A at 34. Ms. Proctor, however, described herself as "in favor of capital punishment, except in a few cases where it may not be appropriate." 14 CR 5911. So did female prospective juror Cummings. 12 CR 5022. Moreover, examining the State's strikes as compared to jurors' answer to this question reveals disparate results, not a gender-neutral reason for the strikes. Five of the 19 (26%) male venirepersons who answered the question wrote that they were generally opposed or neutral to the death penalty.[16] The State did not strike any of them. (The two non-white men the State struck both answered they were in *favor* of the death penalty.[17]) While a higher percentage of female venirepersons who answered the question expressed opposition or neutrality to the death penalty (12 of 22, or 55%),[18] the State struck 92% of those. Thus, it mattered a lot to the State—almost outcome determinative—if women answered that they were generally opposed or neutral, but it did not matter *at all* to the State if men answered they were generally opposed or neutral.[19]

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[16] Male venirepersons who endorsed being generally opposed or neutral were: Mr. Klein, 12 CR 5256; Mr. Boone, 13 CR 5403; Mr. Tyson, 13 CR 5836; Mr. Vinson, 14 CR 6181; and Mr. Mayfield, 14 CR 6325.

[17] Mr. Macias, 10 CR 4039, and Mr. Williams, 10 CR 4057.

[18] Female venirepersons who endorsed being generally opposed or neutral were: Ms. Boyd, 10 CR 4021; Ms. Maberry, 10 CR 4291, Ms. Bivins, 11 CR 4438; Ms. Davis, 11 CR 4456; Ms. Mathis, 11 CR 4857; Ms. Hershey, 13 CR 5421; Ms. Burkman, 13 CR 5602; Ms. DeHoyos, 14 CR 5947; Ms. Long, 14 CR 6055; Ms. Lytle, 14 CR 6127; Ms. Barbee, 15 CR 6364; and Ms. Manske, 15 CR 6436. The State struck all except Ms. Maberry.

[19] Looking strictly at jurors who expressed neutrality on the death penalty, there were 12 venirepersons who answered "neither" to the question of whether they were opposed to or in favor of the death penalty: four men and eight women. Of the women who answered neither, seven (88%) were struck. Of the men, none were struck.

The CCA's third generalization observed that "[n]early all [State-stricken female venirepersons] expressed some favorable views about the option of life without parole, the possibility of rehabilitation, religious redemption, and/or the fact that life without parole forces offenders to live with the consequences of their crimes." App. A at 34. Ms. Proctor, however, did not. Asked how she felt about life imprisonment for a person who is guilty of capital murder, she wrote, "It sometimes concerns me particularly in very heinous crimes. Sometimes the prisoner continues to do harm to others while in prison." 14 CR 5914. With respect to the possibility of rehabilitation, she expressed that punishment, as opposed to rehabilitation, is the more important objective in sentencing violent criminal offenses, adding in her own writing: "[T]hey don't usually reform." 14 CR 5912. With respect to life without parole, she did not express a view that it forces offenders to live with the consequences, but rather that it "costs gobs." 14 CR 5914. She did not express any belief in religious redemption.[20]

The CCA's fourth generalization observed that "[s]ome [of the State-stricken female venirepersons], but not all, emphasized a defendant's background and upbringing as relevant factors in assessing whether the death penalty versus life without parole was appropriate."[21] App. A at 34. Ms. Proctor did not. Asked how relevant a guilty defendant's "childhood and background" would be when making a decision about punishment for capital murder, she answered, "Not important. They have

[20] This generalization does not correspond to any specific, quantifiable question posed on the questionnaire, making statistical analysis not possible.

[21] As with the prior generalization, this generalization does not correspond to any specific, quantifiable question posed on the questionnaire and therefore cannot be statistically analyzed.

grown up—they make their own decisions." 14 CR 5914. Struck female prospective juror Burkman likewise answered the same question, bluntly, "It's not."[22] 13 CR 5605.

The CCA made two other generalizations about reservations expressed by "nearly all" of the State-stricken female jurors: (1) they disagreed that the death penalty "gives the criminal what they deserve;" and (2) they "agreed that life without parole could be an adequate punishment for capital murder." App. A at 34. Ms. Proctor expressed both sentiments, but the data unambiguously shows that both questions were operationalized against women in a disproportionate manner.

With respect to the first observation, it is accurate that nearly all the women struck by the State disagreed with the proposition that the death penalty gives the criminal what they deserve.[23] However, it is the gender disparity with respect to disagreement on that question that is relevant. Ten of the 17 (59%) qualified men who answered the question also disagreed with the proposition on their questionnaire,[24] but the State struck just two, or 20% of those men who disagreed. Of those two, one was a Hispanic man and the other a Black man.[25] No white men who disagreed with

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[22] The prosecutor told Ms. Burkman after individual questioning, "You know, the answers you gave really I'm not surprised by them because they really are consistent with what you said in your questionnaire." 15 RR 153.

[23] This refers to Question 96 on the questionnaire filled out by prospective jurors.

[24] One male venireperson left this question blank, 12 RR 5077, and another circled both agree and disagree, 11 CR 4804. The latter has been counted as not answering the question. Disagreeing male venirepersons were: Mr. Acosta, 10 CR 3896; Mr. Macias, 10 CR 4040; Mr. Williams, 10 CR 4058; Mr. Butler, 10 CR 4238; Mr. Scifres, 11 CR 4606; Mr. Sellers, 11 CR 4642; Mr. Garcia, 12 CR 5275; Mr. Boone, 13 CR 5404; Mr. Tyson, 13 CR 5837; and Mr. Mayfield, 14 CR 6326,

[25] Mr. Macias and Mr. Williams, respectively.

this proposition were struck by the State. While only a slightly higher percentage of qualified women who answered the question disagreed with the proposition (14 of 22, or 64%),[26] the State struck 71% of those. A woman who disagreed with this proposition was therefore over 3.5 times more likely to be struck by the State than a man giving the same answer. Thus, disagreement with this proposition cannot explain the State's strikes in a gender-neutral way. Moreover, the State struck two women who *agreed* with the proposition while striking no men who agreed.[27]

As to the second observation, 26 of the 36 venirepersons who answered the question said that life without parole could be a severe enough punishment for capital murder.[28] And as with the prior question, while this question may have been used by the State to determine which *women* to strike, it was not used to determine which *venirepersons* to strike. Thirteen of the 18 (72%) men who answered the question agreed that life without parole could be an adequate punishment for capital murder.[29]

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[26] One female venireperson did not answer the question. 14 CR 6056. Disagreeing female venirepersons were: Ms. Boyd, 10 CR 4022; Ms. Maberry, 10 CR 4292, Ms. Powell 10 CR 4364, Ms. Bivins, 11 CR 4439; Ms. Davis, 11 CR 4457; Ms. Mathis, 11 CR 4858; Ms. Hershey, 13 CR 5422; Ms. Hutchison, 13 CR 5440; Ms. Burkman, 13 CR 5603; Ms. Proctor, 14 CR 5912; Ms. DeHoyos, 14 CR 5948; Ms. Lytle, 14 CR 6128; Ms. Jones, 14 CR 6200; and Ms. Manske, 15 CR 6437.

[27] Ms. Cummings and Ms. Barbee.

[28] Six did not answer the question (including one who answered both yes and no).

[29] One man answered both yes and no, 10 CR 4222, and that has been counted as not answering. Agreeing men were: Mr. Acosta, 10 CR 3898; Mr. Macias, 10 RR 4042; Mr. Williams, 10 CR 4060; Mr. Butler, 10 CR 4240; Mr. Sellers, 11 CR 4644; Mr. Gambrell, 11 CR 4680; Mr. Poe, 11 CR 4716; Mr. Rice, 11 CR 4806; Mr. Klein, 12 CR 5259; Mr. Garcia, 12 CR 5277; Mr. Boone, 13 CR 5406; Mr. Tyson, 13 CR 5839; and Mr. Vinson, 14 CR 6184.

Only two were struck, neither of them white. Thus, 15% of qualified men (and 0% of qualified white men) who answered that life without parole could be adequate were struck. Only a slightly higher percentage of qualified women who answered the question agreed: 14 of 18 (78%).[30] Nine of those, or 64%, were struck. Thus, a woman agreeing to this question was over four times more likely to be struck than a man answering identically.

The above analysis demonstrates that the CCA's superficial comparison of generalizations about the set of all struck women with generalizations about non-struck jurors was inadequate to reliably adjudicate the question of whether any given peremptory strike the prosecution made was substantially motivated by gender (or by race and gender). Ultimately, all the court did was observe that some disparities existed in the ways that men and women answered questions about the death penalty. It did not, however, examine how the State acted in relation to those disparities and thus failed to see that the State was holding women and non-white prospective jurors to a higher standard than it was similarly situated white men.

[30] Agreeing women were: Ms. Hill, 10 CR 3934; Ms. Boyd, 10 CR 4024; Ms. Stovall, 10 CR 4186; Ms. Maberry, 10 CR 4366; Ms. Bivins, 11 CR 4441; Ms. Davis, 11 CR 4459, Ms. Mathis, 11 CR 4860; Ms. Cummings, 12 CR 5025; Ms. Hutchison, 13 CR 5442; Ms. Burkman, 13 CR 5605; Ms. Proctor, 14 CR 5914; Ms. Lytle, 14 CR 6130; Ms. Jones, 14 CR 6202; and Ms. Barbee, 15 CR 6367. Five women did not answer the question.

CONCLUSION

For the foregoing reasons, the Court should either summarily reverse the CCA's judgment or grant certiorari to decide the questions presented.

Respectfully submitted,

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