No. 18-7536

In the Supreme Court of the United States

JASON M. REEVES,

Petitioner,

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Petitioner has established a prima facie case that Batson v. Kentucky had been violated after the State conducted a side-by-side comparison of a white and a black venire member, and chose the unsympathetic and unattractive white venire member and struck the sympathetic and attractive black venire member?

II.

Whether the Louisiana Supreme Court should have required the State to present race-neutral reasons, under the Batson paradigm, for its strike of the final African-American venire member, instead of surmising for some unknown reason, that the overall voir dire justified the inclusion of the unsympathetic and unattractive white venire member and the exclusion of the sympathetic and attractive black venire member?

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INTRODUCTION

Not only is the Petition in this matter a poor vehicle for review of any of the issues presented, but it presents claims that are not properly before this Court. This Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim [raised in the challenge] 'was either addressed by or properly presented to the state court that rendered the decision [it was] asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (tracing this principle back to *Crowell v. Randell*, 35 U.S. 368 (1836), and *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809)). That has not happened here.

As discussed more fully below, Petitioner raised only an ineffective assistance of counsel claim in the post-conviction proceedings below and in his writ to the Louisiana Supreme Court. But the issue raised in this petition is a violation of *Batson v. Kentucky*, not *Strickland v. Washington*. Since the *Batson* claim was not "specially set up or claimed" in the courts below, this Court should refuse to review the judgments of those courts. As this Court has said, "even treating the rule [denying a claim not presented in the lower courts] as purely prudential, the circumstances here justify no exception." *Howell*, 543 U.S. at 445–46 (citing, *inter alia*, *Adams*, 520 U.S. at 90).

The question *Petitioner* presents is whether he established a *prima facie* case that *Batson* was violated when the State eliminated a black juror, Mr. Joseph, after accepting a white juror, Mr. Phillips. Mr. Joseph was a black man who had recently

served as a juror in a capital murder trial where he and the other jurors had voted against the death penalty. Resp. App. A, 1-7. When the State exercised its peremptory challenge against him, it had already accepted five black jurors on the jury - a higher percentage of blacks than were in the jury venire itself. Pet. App. D, 64 and 83. As the State courts found, the trial had no racial overtones; it involved a white man who committed a rape and murder of a white child. Pet. App. C, 180. The *Batson* claim was denied on appeal by the Louisiana Supreme Court in 2009 and, although the Petitioner sought review in this Court at that time, he did not raise that claim. Pet. App. C; *Reeves v. Louisiana*, 558 U.S. 1031 (2009).

In post-conviction proceedings, Petitioner *only* raised an ineffective assistance of counsel claim arguing that Petitioner's defense attorney did not make out a sufficient *prima facie* showing because he did not make a "comparative juror" argument to the trial court in 2004, prior to this Court's decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005). Pet. App. B, 3. But this ineffective assistance of counsel claim is *not* the claim raised in this petition for certiorari.

Finally, it is unclear what remedy the Petitioner is requesting. At one point he states that he is "simply requesting an evidentiary hearing to determine whether a *prima facie* case had been established at trial," Pet. 10, a hearing he has already been given during post-conviction proceedings. Pet. App. E. At another point he requests a remand "to conduct *the second stage* of a *Batson* hearing, requiring the State to provide race-neutral reasons" for the strike to Mr. Joseph. Pet. 11 (emphasis added). The petition is a tangled morass of factual and legal contradictions and

mischaracterizations. It does not present procedurally proper issues to this Court and, in any event, is a very poor vehicle for discretionary review.

STATEMENT OF THE CASE

Facts of the Crime

This case involves the abduction, violent rape, and gruesome murder of a 4-year old little girl who was had been innocently playing in her own front yard. The account given in the State's Response to the Defendant's Post-Hearing Brief attached to Reeves' Petition as Exhibit G provides a detailed discussion of the underlying facts. The facts are heart-rending, but they are not relevant to the legal issue in this petition, other than to reflect upon the graphic and disturbing nature of what jurors were being asked to consider.[1]

On the afternoon of November 12, 2001, MJT[2] was playing outside of her home with her siblings and neighborhood friends while her mother, CT, performed household chores and kept an eye on the children through the open front door. Pet. App. G, 5. Sometime after 3:30 pm, CT noticed what would later be proven to be Petitioner's car twice driving by their trailer. *Id*. at 6. She was able to identify it in a vehicular lineup. *Id*. at 11. A few minutes later, she saw MJT playing outside with a little boy and another little girl. *Id*. at 5. She would not see her alive again. MJT's father, JT returned home from work about 4:30 pm and went to call his five children

[1] For example, one juror was released for cause because of "the concerns she expressed about the effect that the graphic images, photographic and other images, would have on her ability to serve on this jury." Pet. App. D, 9003-9004.

[2] The State is using the initials of the minor victim associated with this case. Fed. R. Crim. Proc. 49.1(a)(3); *see also* La. Rev. Stat. 46:1844(W)(3).

in for the evening. *Id*. That began what would come to be a community-wide search for MJT, a search that would be proven to have been too late at its inception. The time of MJT's death was later put at 4:30 pm. *Id*. at 4-8.

That evening, MJT's tennis shoes were found and, the following day, her purple sweatpants were also found. *Id*. at 7-8. Two days after she disappeared, her tiny body was found in a secluded, wooded area near the LeBleu Settlement Cemetery by one of the deputy sheriffs searching for her. *Id*. at 8. She was on her back with her sweatshirt pulled midway up and naked from the waist down. She had at least fourteen stab wounds to her neck and chest, one of which went two-thirds of the way around her neck, five to her heart, four to her lungs and a post-mortem stab to her liver. *Id*. at 4. She also had defensive wounds on her right hand and scrape wounds on her buttocks and thighs, indicating she had been dragged around at some point. The coroner testified that it was quite possible that she suffered for a significant amount of time before she died. Four-year old MJT had also been anally raped while she was still alive. Petitioner's semen was found in her rectum. *Id*. at 11-12.

Earlier the day of the murder, Petitioner had been seen at St. Theodore's Holy Family Catholic School parking lot where he had pulled up alongside two girls asking questions. *Id*. at 6. Because of his suspicious behavior, a school employee wrote down the license number of the car and told the principal to report it to the police. *Id*. at 7. The car belonged to Petitioner. One of the girls and two school employees identified him in open court. *Id*. at 6-7. The day after MJT's body was found, a man-trailing dog located her scent inside Petitioner's vehicle. *Id*. at 10-11.

At about 4:15 the afternoon MJT went missing, a Lake Charles police officer had a meeting with a confidential informant in the LeBleu Settlement Cemetery. *Id.* at 8. Petitioner's car was in the parking lot and, at about 4:45, the officer observed Petitioner exit the cemetery and get into his vehicle. The officer identified Petitioner in open court. *Id.*

The night MJT went missing, primarily because of his visits to the school, Petitioner was interviewed about his whereabouts during the day. *Id.* at 9. During those interviews, Petitioner lied about being at the school and what time he had arrived at his home. In later interviews, he made several inculpatory statements, including admitting that only "[him] and the good Lord" knew what happened out there that day. Pet. App. G, 10. He also told his mother, in the presence of police officers, "I did this thing. I don't know why, but I did it." *Id.*

Facts of the Trial

Petitioner was indicted on December 13, 2001 and the matter proceeded to trial in the fall of 2003. Pet. App. C, 13. That first trial resulted in a mistrial. The second trial began October 12, 2004. Petitioner was represented by Ronald Ware, now a judge, and two other attorneys. Pet. App. E, 49—50. At the time of trial, Mr. Ware was the Executive Director of the Calcasieu Parish Public Defender's Office and had tried over 100 felony jury trials, including at least three death penalty cases. *Id.* at 47—48, 51, 96. During jury selection, Petitioner's attorneys were aided by a jury consultant. *Id.* at 96.

Due to the publicity surrounding this horrendous crime, a jury was selected from a different judicial district, transported back to the district in which the crime was committed, and sequestered there throughout the trial. La. Code Crim. Proc. art. 623.1; Resp. App. A, 10-11, 13-16. Jury selection took place from October 12 through October 27, 2004. Initially, twelve panels of approximately fourteen potential jurors were randomly selected by computer. Nothing in the record reflects the racial composition of the initial panels.

As explained to the jurors, *voir dire* was handled in three stages: hardships/publicity, qualification/death penalty/cause challenges, and "specific *voir dire*," during which the peremptory challenges were made. *Id.* at 12-15. Thus, the evidence concerning the jurors' answers to questions regarding their background, what they knew about the case, and how they felt about the death penalty, among other things, is littered throughout nineteen volumes of the transcript covering over two weeks of proceedings. ROA Vol. 18-37 and 41. Additionally, the jurors completed what the judge described as a "very lengthy questionnaire." He asked the attorneys *not to ask* questions of the jurors during *voir dire* that were on the questionnaire unless the answers were vague or unless something needed to be cleared up. Resp. App. 59-60. Unfortunately, the completed juror questionnaire forms have never been made part of the record; thus, there is no way to know all the information the attorneys had regarding each juror. The only record evidence of the race of the individual jurors are statements made by Petitioner's attorney that seven of the challenged jurors were black and a voter registration card showing that Mr. Joseph

is a black man.[3] Otherwise, there are observations made by the parties during trial regarding the number and percentage of black persons and white persons on the jury, but no reference to each individual's race. Pet. App. D, 80-83.

On the last day of jury selection, peremptory challenges began. In Louisiana, attorneys are authorized by law to make what are referred to as "backstrikes." La. Code Crim. Proc. art. 799.1. The exact process can vary from court to court but, generally, and in this case, when the parties have arrived at eleven persons on the jury, they will begin to use any remaining peremptory challenges to exclude jurors for which they have residual concerns or who may not be as favorable as upcoming jurors. With the acceptance of Ms. Charlotte Smith, there were eleven persons on this jury. Pet. App. D, 58. At that point, the State used its second backstrike to excuse Ms. Mable Brown. *Id*. at 59. The parties then accepted Ms. Barbara Linder, which resulted in eleven jurors again. The State then accepted Mr. Whiteoak resulting in twelve jurors. The defense, however, backstruck Mr. Daniel Norton, resulting in eleven jurors seated again. *Id*. at 60. The State then accepted Mr. Carlton Francois and the Defense backstruck Mr. John Frederickson. *Id*. at 61-62. Again, the jury was comprised of eleven persons. At that time, Mr. Craig Phillips was considered. The State accepted Mr. Phillips and the Defense used its twelfth peremptory to backstrike Ms. Barbara Linder (who it had just accepted). *Id*. at 62-63. At that point, Mr. Ian Joseph was considered. The State used its eleventh peremptory strike to excuse Mr.

[3] Although Petitioner attaches voter registration cards for several jurors in Appendix ___, there is nothing in the record that reflects any individual, other than Mr. Joseph, was ever a part of this jury venire. They were not part of the final thirty-six jurors considered for selection.

Joseph. *Id*. at 64. In contradiction to what Reeves states in his petition, the State did not use a *backstrike* to eliminate Mr. Joseph. Pet. 5. It used its twelfth peremptory to excuse Ms. Tammy Lamana. Pet. App. D, 64. Both sides having used all their peremptory challenges, the next juror, Mr. Donald Schneider was the twelfth juror selected. *Id*. at 64-65. At this point, the State had selected *five* black jurors and seven white jurors to serve on the jury. *Id*. at 83.

Immediately thereafter, the selection of alternate jurors began. The first potential alternate was Thomas Pugh, who the State excused. *Id*. at 65-67. The court then tendered Arlette Henderson for consideration; both sides accepted Ms. Henderson making her the first alternate. *Id*. at 67-71. Mr. Larry Davis, the last juror on that panel, was then tendered. *Id.* at 71. The State accepted him, but the Defense peremptorily excused him. *Id*. at 71-72. At that point, a disagreement between Mr. Ware and the court as to the way peremptory challenges could be used for the alternates began. *Id*. at 72-77.

Suddenly, at the end of that disagreement and as the court was sending for the next panel, Mr. Ware made his *Batson* objection "to the State's exercising peremptories." *Id.* at 77. The court questioned the basis of the challenge and pointed out that Mr. Ware needed to establish a *prima facie* case. *Id*. He further expressed concern that Petitioner had not made a contemporaneous objection to the alleged wrongful use of a peremptory. *Id*. at 78. The State argued that the right to raise a *Batson* objection ended at the selection of the twelve jurors because, otherwise,

selection would have to start again but the court agreed with Petitioner and asked him to establish a *prima facie* case. *Id.* at 78-80.

The State volunteered that it had challenged seven black and five white jurors. *Id*. at 80. Petitioner first argued that those numbers, standing alone, established a pattern. *Id*. at 80-83. Together, the parties and the court determined that thirty-six jurors had been interviewed in the final round. The court then determined that thirteen of the thirty-six venire members were black (36%) (and, thus, 23 were white (64%)). Given that the jury was comprised of five black (42%) and seven white jurors (58%), "[j]ust numerically *the ratio of the existing jury is higher than that of the entire panel*, showing that if anything there was a propensity to be more minority-oriented than less minority-oriented." *Id.* at 83. (emphasis added).

The court then asked Petitioner, "[C]an you give me any other - anything else that could help the court with a *prima facie* showing?" *Id*. at 84. Petitioner's counsel then began to point out challenged black jurors for which, he argued, there was no race-neutral reason to excuse: Ivy Sanford, Mr. Isadore, Ms. Mable Brown, Ms. Nasthasia Webb, Lance Guidry, and, finally, Ian Joseph. *Id*. at 84-97. Petitioner's counsel argued that he may show "circumstances sufficient to raise an inference that the prosecutor struck the venire person on account of race … specific facts regarding specific prospective jurors can be used and is appropriate." *Id*. at 86. In particular, as to Mr. Joseph, the juror he now complains of, Petitioner argued that

> there was no pre-trial publicity issue, there was no *Witt*, *Witherspoon* issue, no hardship issue, no other issue. The man had served -- was a juror in a murder case on a previous occasion where a life sentence, which obviously means that there was a conviction in the case, the

> record reflects whether or not he joined in, that I don't have an instant recollection of that, whether or not he was -- he agreed with the verdict. The verdict was obviously guilty as – guilty. In fact, there was a – that was a capital prosecution. And if I recall correctly, he did join in the verdict – in the verdict for conviction. He also joined in the unanimous verdict for a recommendation or a determination that life sentence – life was appropriate in that case.
>
> *Id*. at 96.

The court considered the three-step *Batson* analysis throughout. *Id*. at 84-97. It found that the Petitioner had the burden of first establishing a *prima facie* case of discrimination prior to the State being required to give race-neutral reasons for its strikes. *Id*. at 88. Relying on *State v. Green,* 655 So.2d 272, 285 (La. 1995) and *Batson*, the court found that

> [t]he intent of the prosecutor at the time that he exercised peremptory strikes is the sole focus. Such facts include [1] a pattern of strikes by the prosecution against members of a suspect class, [2] statements or actions of the prosecutor which would support the inference, and [3] the exercise of peremptory strikes was motivated by impermissible considerations, [4] the composition of the venire and of the jury finally empaneled and [5] any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination.

Id. at 87.

After argument, the trial court denied the challenge on the basis that defense counsel had failed to establish a *prima facie* case, step one of a *Batson* analysis. *Id.* at 91-92. It noted that "without any type of pattern, disparate composition, or anything that *could* be enunciated to specifically take the court to question the prosecution's answer, the prima facie showing falls." *Id*. (emphasis added).

After trial, Petitioner was convicted of the rape and murder of MJT and, after a penalty phase proceeding, the jury determined that the death penalty was the appropriate punishment.

The Appeal

With new counsel appointed, Petitioner raised this *Batson* challenge on direct appeal, along with *78* other assignments of error. Pet. App. C. On appeal, the Petitioner made only a statistical argument and did not argue that a *prima facie* case was proved, or could have been proved, through a comparative juror analysis. Pet. App. C at 180-185. After an analysis of the *voir dire* as a whole, the Louisiana Supreme Court, in an unpublished appendix, held that the trial court had been correct in its determination that no *prima facie* showing of purposeful discrimination had been made by the defense. Pet. App. C, 180-185. First, the case itself "presented no overt racial overtones." *Id*. at 184. Second, the trial court acted properly by considering the timing of the objection because, "[a]lthough the objection was timely under our law … this circumstance contrasts sharply with the situation in other cases where a defense attorney raises an objection immediately after a prospective juror is challenged and gives reasons." *Id*. Third, the trial judge properly considered "the overall tenor of the *voir dire* questioning. Our review shows that the prosecution used the same questions throughout its *voir dire*. There is no indication that any particular prospective jurors were 'targeted' for questioning in any way." *Id*. Fourth, the ultimate makeup of the jury was five black jurors and seven white jurors. *Id*. at 184-185. The court noted that while "the mere presence of African American jurors does

not necessarily defeat a *Batson* claim," it also held that "the unanimity requirement of a capital case sentencing recommendation may be considered." *Id*. at 185. Finally, the court noted that the trial judge had found "no discriminatory intent whatsoever" and that because "the ratio of the existing jury [was] higher than that of the entire panel," the truth was that the jury selection process had been "more minority-oriented than less minority-oriented." *Id*.

Petitioner sought review by this Court on an unrelated issue—whether Petitioner had the counsel of his choice at trial—which was denied on November 16, 2009. *Reeves v. Louisiana*, 558 U.S. 1031 (2009).

Post-Conviction Proceedings

Petitioner filed a shell "Petition for Post-Conviction Relief and Request for Counsel" on December 23, 2009 and on March 24, 2010 the trial court signed an order allowing counsel herein, Gary Clements, to enroll as counsel for Petitioner. It was not until March 4, 2013 that a complete, amended petition for post-conviction relief was filed. Among numerous other claims of ineffective assistance of counsel, Petitioner claimed that trial counsel was ineffective for failing to *successfully* urge a *Batson* challenge. Pet. App. G 2-3.

An evidentiary hearing was finally held in April 2017, thirteen years after trial. Pet. App. E. Petitioner was represented by three attorneys but admitted no new evidence regarding his *Batson* claim other than an admission by Petitioner's trial counsel that he had no strategic reason for not comparing black jurors to white jurors. *Id. at* 78. None of the juror questionnaires were submitted, no evidence of the race of

the individual jurors was offered (other than post-conviction counsel's statements that certain jurors were black and that Mr. Phillips was white), and no evidence of the pattern of accepting or objecting to each juror was offered. Only one of Petitioner's three trial counsel was called as a witness and the total of his testimony on *voir dire* was eleven answers to questions asked by the defense (*Id*. at 66-67, 78-79) and seven answers to questions asked by the State on cross-examination. *Id*. at 97-98. Counsel agreed that he had made a *Batson* challenge at trial, that it was based on the fact that the State had used seven peremptory challenges against black jurors, and that he did not compare any of the seven struck jurors with white jurors (all of which was already reflected in the record). *Id*. at 66. On cross-examination, he admitted that the defense team had the assistance of a jury consultant, that counsel had to view all of a jurors' answers as a whole to determine if he or she wanted to select them or challenge them, and that "you maybe wanted to take a chance with a particular juror because you know you don't want to take any chances with one that's coming up later." Pet. App. E, 96. Petitioner made no closing argument but, instead, requested to submit argument by "memo" rather than at the hearing. *Id*. at 133.

Petitioner's ineffective assistance of counsel claim was denied by the post-conviction judge (the same judge who tried the case). The court found Petitioner could not "show he was prejudiced" by ineffective assistance of counsel since "[t]here was no evidence to support a *Batson* challenge." Pet. App. B, 3.

Petitioner sought review by the Louisiana Supreme Court, arguing that his trial counsel was ineffective in eight different ways including failing "to take

adequate steps in urging his *Batson* objection." Pet. App. A, 8-9 (footnote omitted). The Supreme Court found that the claim, "couched as a post-conviction ineffective assistance of counsel argument, [was] essentially an attempt to re-litigate the claim raised on appeal. That roundabout method is prohibited." Pet. App. A, 3, 8, 9 (citing La. Code Crim. Proc. art. 930.4(A); *State v. Lee*, 181 So.3d 631, 638 (La. 2015) (such claims "are not truly new claims)). Furthermore, it noted that Petitioner had not offered any new evidence at the post-conviction hearing but only new arguments and that those arguments—that drew comparisons between Juror Joseph and Juror Phillips—involved "cherry-picking" answers of the two jurors and did not consider the entirety of the *voir dire*. Pet. App. A, 9-10. Thus, this "*Batson*-related ineffective assistance of counsel claim" lacked merit.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE TO DECIDE A JURY DISCRIMINATION ISSUE.

A. In His Petition, Reeves Repeatedly Mischaracterizes the Facts and Reasons for Judgment Through Misstatement or Omission.

Reeves has failed to present to the court - with accuracy, brevity, or clarity - what is essential to the Court's ready and adequate understanding of the points necessary to rule in this case. Furthermore, he has repeatedly mischaracterized the facts of this case, the reasons given for the state court judgments, and the caselaw governing discrimination in the selection of a jury. Some of the mischaracterizations include:

1. The questions presented to this Court were not the questions presented to the post-conviction trial court or the Louisiana Supreme Court, although that is not

stated in the Petition. Pet. i. The claim presented to the state courts was an ineffective assistance of counsel claim, not a direct *Batson* claim. Pet. App. A, B, and E. Petitioner does not raise an ineffective assistance of counsel claim in this Petition.

2. Petitioner repeatedly states that the State "made a side-by-side comparison between a white and an African-American juror" in selecting the final juror. Pet. i. But the State made no comparisons between jurors at trial, much less in selecting the final juror, a man named Donald Schneider.

3. While it is true that the Louisiana Supreme Court found Petitioner had not made a *prima facie* case of discrimination of a *Batson* violation, it was on appeal in *2009,* not 2018, a fact not pointed out in the petition.

4. Petitioner states that the court ruled that there was no need for the State to give race neutral reasons for rejection of any juror. Although the three-step Batson process was discussed by the trial court, neither the post-conviction court nor the Louisiana Supreme Court ever made such a finding.

5. Petitioner claims, in his second reason for granting the writ, that "the Louisiana Supreme Court impermissibly surmised that there was a race-neutral reason for the state's peremptory strikes" arguing that the court "invented an unprecedented standard of "surmising." Pet. 11. But Petitioner does not and cannot point to the language in the Louisiana Supreme Court's opinion where this term can be found, much less where such a standard is created or applied.

6. Petitioner claims that the Eighth Amendment is involved. Pet. 2. It is not.

7. Petitioner claims that an evidentiary hearing on the *Batson* issue was conducted on April 18, 2017. Pet. 3. But instead the hearing was on the ineffective assistance of counsel claims. Pet. App. G.

8. Petitioner states that as support for its *prima facie* case, "the defense raised only the fact that the State used more peremptory challenges against black prospective jurors than white." Pet. 3, 4. But the defense also argued, individually, for each black juror challenged that there were no non-racial reasons for excluding the juror. Pet. App. D, 84-97.

9. Petitioner cherry-picks statements from each of the various courts' rulings that mischaracterize the overall reasons for judgment by each court. For example, Petitioner quotes the part of the trial court's ruling that focuses on the pattern of strikes but fails to inform this Court that the judge also considered "the statements or actions of the prosecutor which would support the inference, whether the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination." Pet. App. D, 87.

10. Petitioner states that he "established in post-conviction" that five of the excluded African-Americans had characteristics that made them desirable to the State and indistinguishable from most of the whites on the jury. Pet. 4. But Petitioner offered *no* evidence of this in post-conviction—no witness, no transcript, no juror questionnaire, no prosecution file, nothing. Pet. App. E, 66-79. Furthermore, other

than trial counsel's statements at trial that seven of the excluded jurors were black and the submission of Mr. Joseph's voter registration card into the record as an attachment to his post-hearing brief, there is nothing in the record to indicate the individual races of the selected jury members, or other excluded prospective jurors, in order to make any kind of comparison.

11. Petitioner states that the State backstruck Ian Joseph (Pet. 5), which is incorrect. Pet. App. E, 64.

B. The Longstanding Rule That This Court Will Not Consider Claims That Were Not Pressed or Passed Upon in The State Court Whose Judgment Is at Issue Creates a Weighty Presumption Against Review.

As noted above, Petitioner pressed his *Batson* claim at trial in 2004 and on appeal to the Louisiana Supreme Court in 2009, ten years ago. Pet. App. D, 77-97 and Pet. App. C, 184-185. Although he argued at trial that the State excused more black jurors than white jurors and that there was no good reason to excuse the black jurors, he did not make a "comparative juror" argument or present any evidence regarding a comparative juror before either court. Pet. App. D, 77-97; Pet. App. C, 185-185. Both courts determined that he had not met his burden of proof to make out a *prima facie* case of discrimination. Pet. App. D, 91-92 and 97; Pet. App. C, 184-185. This Court denied Reeves' petition for a writ of certiorari to review the 2009 judgment, which raised a different ground for review than his *Batson* claim.[4]

[4] As an additional point, "[t]he time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." 28 U.S.C. § 2101(d). Those rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort ... shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of judgment," Rule 13.1. This period

As Petitioner concedes, he made a different claim during state post-conviction, arguing that trial counsel was ineffective for failing to properly argue his *Batson* claim. *See* Pet. 4. The law, facts, argument, and burden of proof on an ineffective assistance of counsel claim are entirely different than the law, facts, argument, and burden of proof on a *Batson* claim. Both the post-conviction court and the Louisiana Supreme Court found that Petitioner had not proven that his trial counsel was ineffective nor that he was prejudiced. Pet. App. A and B. But that is not the constitutional claim that Petitioner now raises in this petition and the shifting of Petitioner's constitutional arguments creates a confusing and inadequate factual and legal record below.

As argued above, the fact that the *Batson* claim was not the error complained of in the courts below creates a bar to Petitioner's claim. Admittedly, though, this Court has not clearly articulated "whether [its] requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential." *Howell*, 543 U.S. at 445–46 (2005) (citing, *inter alia, Adams*, 520 U.S. at 90). Nevertheless, the Court has noted that "[e]ven if [it is] not jurisdictionally barred from considering claims not pressed or passed upon in the state court, … the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review. *Id*. at 436 (citing *Gates*, 462 U.S. at 218–222 (1983)).

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may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6. It has been ten years since the Louisiana Supreme Court's judgment on Petitioner's *Batson* claim was rendered. This petition asking for review of the *Batson* claim is, therefore, untimely and should not be considered.

Petitioner attempts to sidestep this significant procedural problem. Citing *Foster v. Chatman*, 136 S.Ct. 1737, 1745—1747 (2016)), he argues that "*Batson* claims may be renewed in post-conviction." Pet. 4, n. 3. The *Foster* decision, though, is inapposite. In *Foster*, the petitioner had directly re-urged his Batson claim in the state post-conviction proceedings and had also entered significant additional evidence of discriminatory intent into the record. *Foster*, 136 S.Ct. at 1743-44. After considering the additional evidence presented, the state post-conviction court denied Foster's *Batson* claim as *res judicata* under state law (*id*. at 1745) but also "engaged in four pages of what it termed a '*Batson* … analysis' in which it evaluated the original trial record and habeas record, including the newly discovered prosecution file … and concluded that Foster's 'renewed Batson claim [was] without merit.'" *Id*. at 1746. Additionally, the Georgia Supreme Court had simply denied a Certificate of Probable Cause without giving reasons for its decision. *Id*. at 1745. This Court found that the Supreme Court's judgment was a judgment on the merits "in the absence of positive assurance to the contrary." *Id*. at 1746, n. 2. This Court ruled that the Georgia Supreme Court's denial of Foster's *Batson* claim was reviewable by this Court because "the state habeas court's application of *res judicata* to Foster's *Batson* claim was not independent of the merits of his federal constitutional challenge." *Id*. at 1746.

However, this case is nothing like *Foster*. First and foremost, the constitutional claim denied by the post-conviction trial court was not a directly re-urged *Batson* claim but, rather, an entirely new ineffective assistance of counsel claim (one of seven ineffective assistance of counsel claims) requiring different elements of proof

(performance below an objective standard of reasonableness) and a different standard of harm (prejudice which rendered the proceedings unfair and the conviction suspect). Pet. App. A and B. Thus, although the Louisiana Supreme Court found that the claim, "couched as a post-conviction ineffective assistance of counsel argument, [was] essentially an attempt to re-litigate the claim raised on appeal," it was not denied by the post-conviction trial court under Louisiana's repetitive application law. *See* La. C.Cr.P. art. 930.4. Moreover, Petitioner presented no new evidence of prosecutorial discriminatory intent—no testimony, no newly discovered material from the prosecutor's file, no juror questionnaires, no evidence of the race of the individual jurors; he only made different *arguments* than trial and appellate counsel had made based on the same record. Pet. App. E, 66—67, 78—79, 97. Foster's circumstances were very different—he "filed a series of requests under the Georgia Open Records Act" and obtained several significant new pieces of evidence that were never considered before and to which he did not have access at the time of trial. *Foster*, 136 S.Ct. at 1744—55 (citation omitted).

C. The Record Has Not Been Sufficiently Developed for This Court to Rule On the Merits of This Case.

This Court has instructed that a trial judge is to consider the totality of relevant facts when ruling on a *Batson* challenge. *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986). This Court cannot know, though, what the totality of relevant facts in this case included because the record below is incomplete.

Petitioner has not offered into evidence—whether at trial or during the post-conviction hearing—any evidence to indicate the race of *all* the jurors. Pet. App. E,

66-79. Thus, there is no way to determine the racial pattern of selection of the jurors.

Perhaps more importantly, this Court has no way of knowing what other evidence of background and opinions the trial judge had before him to aid in understanding any racial overtones, or lack thereof, in the overall jury selection process. It is known that he had the completed juror questionnaires, as did all counsel, and that he had instructed the attorneys not to ask for information of the jurors during *voir dire* that was already contained in the questionnaires. Resp. App. A, 17-18. But we do not have the jurors' questionnaires, which are needed to complete this record.

D. Even Assuming the Alleged Errors Have Merit, The Questions Presented Request Little More Than Error Correction in A Unique Case.

At best, Petitioner appears to be objecting to no more than *misapplication of settled law* to a narrow issue regarding which a trial court's ruling must be sustained unless clearly erroneous. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). As this Court has stated, these factual determinations lie peculiarly within a trial judge's province. *Id.* Petitioner is requesting no more than remand for a further evidentiary hearing. Pet. 10-11. Petitioner does not suggest that a circuit split exists and does not give examples of factually similar cases decided differently than this one. This case invites this Court to engage in little more than error correction, which is not a compelling reason to exercise its power of discretionary review.

II. PETITIONER HAS NOT RAISED, MUCH LESS PROVEN, AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Petitioner does not assert here the argument he asserted below, that trial counsel was ineffective. The questions presented do not suggest that he is reurging that argument to the Court. Moreover, none of the passing references to the claim below can be taken as an assertion in this Court that his trial counsel was ineffective. According to this Court's rules, only the questions set out in the petition, or fairly included therein, are to be considered by this Court.

However, even if the Court were to consider such a claim, Petitioner presented a statistical analysis of the use of peremptory challenges by the prosecutor. He also argued that there was no non-racial reason to exclude each of the black jurors challenged. He was unable to prove a *prima facie* case of improper motivation by the prosecution because none existed. Petitioner cannot show that his trial counsel was ineffective for failing to establish a *prima facie* case that did not exist. His performance did not fall below an objective standard of reasonableness under professional norms and, furthermore, Petitioner was not prejudiced to the extent that the trial was rendered unfair and the verdict suspect.

III. THE LOUISIANA SUPREME COURT DECISION IS NOT IN CONFLICT WITH *MILLER-EL* AND *SNYDER*.

Petitioner's first and main argument for granting a writ is that the "Louisiana Supreme Court decision is in conflict with *Miller-El* [*v. Dretke*, 545 U.S. 231 (2005) (Miller-El II)] and *Snyder* [*v. Louisiana*, 562 U.S. 472 (2008)], which held that a *prima facie* case of a *Batson* violation can be established by side-by-side comparison of black jurors who are stricken with white jurors who are accepted." Pet. 7. This claim is

improperly premised from the beginning because *Miller-El* and *Snyder* did *not* hold that a *prima facie* case can be established by a comparative juror analysis, nor does Petitioner make, much less substantiate, that argument anywhere in his petition.

Certainly, the so-called "comparative juror analysis" was first described in *Miller-El* (specifically, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*)) but the State conceded in *Miller-El* that a *prima facie* case of discrimination had been proven (only one black juror was selected to serve on the jury). *Miller-El I*, 537 U.S. at 338. As the Court stated in *Miller-El II*, "If a prosecutor's *proffered reason* for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered *at Batson's third step*." *Miller-El II*, 545 U.S. at 241 (emphasis added). Thus, comparative juror analysis applies at step two of *Batson*, when the prosecutor is required to give reasons for his peremptory strike, not at step one where the defendant bears the burden of proving a *prima facie* case of discrimination without the State giving its reason for the challenge. At step one, there is no proffered reason for the strike of a black juror to compare to the reason for accepting a white juror.

Similarly, in *Snyder*, step one of *Batson* was not at issue because the trial court had immediately requested reasons for the strike when the objection was made so that proving a *prima facie* case became moot. *See State v. Snyder*, 750 So.32 832, 841 (La. 1999); *Snyder*, 552 U.S. at 478. Thus, as with *Miller-El*, *Snyder* does not hold that a *prima facie* case can be established by a side-by-side juror comparison. *Snyder* reiterates that the prosecutor's proffered reason for the challenge must be compared

to the answers given by other non-targeted members of the jury. There is nothing in the record to indicate why the prosecutor challenged Mr. Joseph, although it is easy to see why a prosecutor would not want a juror who had recently served in a capital trial and voted against the death penalty.

Furthermore, the state court reasons for judgment were based on *Batson* and other state and federal cases decided prior to the trial in 2004 and are not in conflict with *Miller-El* or *Snyder*. Pet. App. A and B. Considering all relevant circumstances, including "the pattern of strikes by the prosecution against members of a suspect class [no "pattern" was shown], the statements or actions of the prosecutor which would support the inference [there were none], whether the exercise of peremptory strikes was motivated by impermissible considerations [it was not], the composition of the venire and of the jury finally empaneled [a larger percentage of blacks were on the jury (5/12; 42%) than were in the venire (13/36; 36%)] and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination [there was none]," the trial court found that petitioner had not made out a *prima facie* case of discrimination. Pet. App. B, 3 and Pet. App. D, 91-92. On appeal, the Louisiana Supreme Court agreed with these findings. Pet. App. C, 183-185.

In post-conviction, no further evidence of discriminatory intent was produced so the post-conviction court and the Louisiana Supreme Court did not reverse their earlier determinations while reviewing the ineffective assistance of counsel claim. Pet. App. E, 66-79 and Pet. App. C, 183-185. The considerations used by the trial

court, and reviewed by the Louisiana Supreme Court, track the considerations discussed in *Miller-El* and *Snyder*, as well as subsequent cases, including *Johnson v. California*, 545 U.S. 162 (2005) and are not in conflict.

III. THE LOUISIANA COURTS WERE CORRECT.

A *Batson* challenge involves three "familiar" steps. The step at issue in Reeves' petition is the first: "defendant must make out a *prima facie* case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson*, 545 U.S. at 168. This Court explained that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* at 170.

This Court has illustrated several ways by which a *prima facie* case may be established. But Petitioner has not carried his burden of proof on any of them. Most commonly, a *prima facie* case is established by showing a pattern of strikes which tend to show that the prosecutor is motivated to remove jurors based on their race. This can involve the number of jurors of a targeted class excused, the number of jurors of that class who are selected, and the order in which the strikes are made. For example, in *Batson*, *all* four potential black jurors were struck;[5] in *Johnson*, *all* three black jurors were struck;[6] in *Snyder*, *all* five potential black jurors were struck;[7] in *Foster*, *all* four black jurors were struck;[8] and in *Miller-El*, *ten out of the eleven*

[5] 476 U.S. at 83.
[6] 545 U.S. at 164.
[7] 552 U.S. 472, 475—476 (2008).
[8] 136 S.Ct. at 1743.

potential black jurors were struck.[9] In this case, only seven of the thirteen black prospective jurors were struck resulting in a jury comprised of five black jurors and seven white jurors. Pet. App. C, 183-185. Petitioner, who bears the burden of proof, presented no evidence regarding the race of the individual jurors on the venire or of any of the final thirty-six, other than the seven black jurors who were eliminated. Nor did he offer any evidence of the order in which the strikes were made. Obviously, no pattern of discriminatory strikes was proven by Petitioner to the trial court or the post-conviction court.

This Court has pointed out other facts that may be relevant at step one of a *Batson* inquiry, none of which apply in this case. The facts in the *Miller-El* case, for example, included a history of discrimination in that particular district attorney's office. 545 U.S. at 236. There is no evidence or allegation of that here.

The *Miller-El* case also involved disparate or targeted questioning of minority members of the venire, particularly as to the death penalty. 537 U.S. at 344. Petitioner made no such allegation in this case and the Louisiana Supreme Court specifically found that there was no targeted or disparate questioning of the jurors in this case. Pet. App. C, 184-185.

In *Powers v. Ohio,* 499 U.S. 400, 403 (1991), this Court suggested that race may become "somehow implicated in the crime or the trial…." *See also* *Johnson*, 545 U.S. at 167—170 (2005) (where the facts of the case suggested race was relevant).

[9] 537 U.S. 322, 326 (2003).

The Louisiana Supreme Court also found that race was not relevant or implicated in the crime. Both Petitioner and his victim are white. Pet. App. C, 184-185.

Finally, the *Powers* opinion also suggested that "whether any black persons sat on petitioner's petit jury" may be relevant. Five black jurors were selected for the petit jury in this case prior to the *Batson* claim being asserted. 499 U.S. at 403; Pet. App. C, 184-185. In fact, the trial court found that a greater percentage of black persons were on the jury than in the venire "showing that if anything there was a propensity to be more minority-oriented than less minority-oriented." Pet. App. D, 83. Petitioner simply did not carry his burden of making out a *prima facie* case of racially discriminatory motivation on the part of the prosecutor. And so held the trial court, the post-conviction court, and the Louisiana Supreme Court.

A *Batson* inquiry "turns largely on an evaluation of credibility" and, during direct review, a "trial court's determination is entitled to great deference and must be sustained unless it is clearly erroneous." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (citations and internal quotation marks omitted); *see also Foster*, 136 S.Ct. at 1747 ("[I]n the absence of exceptional circumstances, [the Court] defer[s] to state court factual findings unless … they are clearly erroneous."). Deference to the trial judge is important because "he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges" and he is in a good position "to discern whether a challenge to a black juror has evidentiary significance." *United States v. Armstrong*, 517 U.S.

456, 467—68 (1996) (citation omitted). This Court should defer to the trial court's judgment in this case, particularly on the insufficient record before it.

CONCLUSION

The State of Louisiana respectfully submits that the petition for a writ of certiorari should be denied.

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