reported to police that they saw Thigpen at the Eckard's Store after the time the State alleges Mr. Reeves had murdered her, as detailed in Claim IV, supra, a clear reasonable probability exists that the government would not have been successful in rebutting Mr. Reeves's presumption of innocence and that the jury could have found Mr. Reeves not guilty of first-degree murder, obviating the imposition of a death sentence upon Mr. Reeves.

Therefore, this Court should vacate Mr. Reeves's conviction, and remand this case for a new trial. The petitioner requests an evidentiary hearing on this claim.

CLAIM VI

TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE COMPELLING, READILY AVAILABLE EVIDENCE IN SUPPORT OF MR. REEVES'S CLAIM THAT THE STATE UTILIZED PEREMPTORY CHALLENGES TO PURPOSEFULLY DISCRIMINATE AGAINST AFRICAN-AMERICANS IN JURY SELECTION, IN VIOLATION OF *BATSON V. KENTUCKY*.

It is well settled that race is an unconstitutional basis on which to strike a prospective juror. *See, e.g., Georgia v. McCollum*, 505 U.S. 42, 44 (1992) ("For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."). In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court identified a three-step test to determine whether the State's use of peremptory challenges in jury selection violates equal protection. Under *Batson*'s first step, the defendant must make a *prima facie* "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168 (2005) (quoting *Batson*, 476 U.S. at 93-94). The Court explained in *Johnson* that:

> We did not intend [*Batson*'s] first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirement of *Batson*'s first step by producing *evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.*

Johnson, 545 U.S. at 164 (emphasis added).

Once the defendant has made such a showing, the burden shifts to the State to proffer a race-neutral explanation for each strike in question. *Batson*, 476 U.S. at 94. Finally, *Batson*'s third step calls for the court to assess whether the movant has established that the State has engaged in purposeful discrimination. *Id.* at 98.

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A. Trial Counsel's failure to introduce readily available information to establish a *prima facie* case of discrimination fell below reasonable professional norms.

There can be no doubt that the State purposefully discriminated against African-Americans when it peremptorily challenged them on account of their race, in violation of *Batson*; a fact which trial counsel recognized by objecting to that practice and arguing that there was a *prima facie* case of discrimination. However, notwithstanding this objection, trial counsel inexplicably failed to introduce compelling, readily available evidence to support this claim. Specifically, to support his claim, counsel simply relied on (1) the fact that the State utilized seven of its twelve peremptory challenges on African-Americans (R. 9031) and (2) evidence that nothing was revealed during the *voir dire* that would suggest that any of the seven excluded African-Americans would not be desirable jurors from the State's perspective (R. 9034-47).

Counsel could have, but inexplicably did not, bolster this claim by also introducing additional statistical evidence that the State's exercising seven of twelve peremptory challenges on African-Americans was statistically significant when viewed in light of the fact that there were twenty-three qualified white jurors and thirteen qualified African-American jurors. Consequently, the State removed only five of the twenty-three qualified whites (22%) but removed seven of the thirteen qualified African-Americans (54%). Trial counsel's reliance simply on the fact that the Stated used seven of twelve peremptory challenges, without providing the additional information noted above to put this information into an appropriate statistical context, fell below reasonable professional norms. By failing to place these statistics into their proper context, trial counsel allowed the trial court to wrongly conclude that there was no statistical information that raised an inference of discrimination (R. 9034-35).

Counsel also could have, but inexplicably did not, bolster this claim by also introducing evidence that, in addition to the fact that five[27] of the excluded African-Americans – Nasthasia Webb, Lance Guidry, Ivy Sanford, Mable Brown and Ian Joseph – had characteristics that made them desirable to the State and indistinguishable from most of the whites that the State accepted on to the jury (*e.g.*, the five excluded African-Americans, along with most of the whites that the State accepted on to the jury, all indicated that they could impose the death penalty, none of them

[27] Mr. Reeves concedes that two of the excluded African-Americans had obvious characteristics that made them undesirable to the State: Lee Diamond was extremely hard of hearing (R. 5381) and Patrick Isadore slept through much of *voir dire* (R. 9041). The other five excluded African-Americans – Nasthasia Webb, Lance Guidry, Ivy Sanford, Mable Brown and Ian Joseph – had no such obvious characteristics that would make them undesirable to the State or distinguish them in any way from the whites that the State accepted on to the jury.

had any hardship issues, none of them had any meaningful pre-trial knowledge about the case, and none of them had any other characteristics that would have made them undesirable to the State[28]), one of the whites that the State accepted onto the jury actually had characteristics that would objectively had made him a much less desirable juror for the State than any of the excluded African-Americans (none of whom had these less desirable characteristics).

Specifically, white juror Craig Phillips: (1) believed that confessions are not always 100% reliable and that sleep deprivation, the skill and experience of an interrogator, the accused person's state of mind and evidence conflicting with what had been confessed are all factors that could affect the reliability of a confession (R. 8851-53); (2) believed that some children fall through and never really get a chance in life due to poverty, poor parenting and dysfunctional family life (R. 8854-55); and (3) when asked whether he had strong feelings for or against law enforcement officials, responded that, due to negative personal experiences he had pertaining to his ex-wife having been arrested thirteen or fourteen times over the years and law enforcement officials searching his home, gave the following response, indicating a distrust of law enforcement officials:

> Right off the shelf, years ago, I would give law enforcement just so much in certain sections and divisions of law enforcement, after my experience, certain sections, I only give them this much now (R. 8835).

None of the excluded African-American jurors indicated that they had any questions about the reliability of confessions or any beliefs about children not getting a chance in life, and none of them indicated any hesitancy about believing law enforcement officials.

Clearly, if the readily available additional statistical and comparative information described above that counsel did not introduce was coupled with the evidence that counsel did introduce, there can be no question that a *prima facie* case of discrimination would have been established in the trial court. Trial counsel, in his declaration, concedes that he did not have any strategy reason for failing to compare the challenged potential African-American jurors with the unchallenged white jurors (see Ex. 10, "Declaration of Ronald F. Ware", paragraph 15). However, because of trial counsel's failures, the State was never required to explain why it excluded the African-Americans from the jury, and the court never moved to *Batson*'s third step,

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[28] The following are citations to the portions of the record where each of the five excluded African-Americans at issue indicated that they could impose the death penalty: R. 6206-09 (Webb); R. 6177-83 (Guidry); R. 5726-30 (Sanford); R. 6194-97 (Brown); and R. 6373-78 (Joseph).

under which it would have had little choice but to hold that the State had purposefully discriminated. Counsel's failure to introduce this additional evidence fell below reasonable professional norms and so constituted deficient performance under the first prong of the two-part test governing ineffective assistance of counsel claims established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Trial Counsel's failure to introduce readily available information prejudiced Mr. Reeves.

By deficiently raising and supporting the undeniable inference of discriminatory purpose that emerged from the State's use of peremptory challenges against African-Americans, trial counsel prejudiced Mr. Reeves. Under the three-part *Batson* test, "[o]nce the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97. Here, counsel failed to shift the burden to the State to provide race-neutral reasons for its challenges of these excluded African-American males – a burden that *voir dire* suggests the State would not have been able to meet. As explained above, nothing in the jury *voir dire* indicates that any of the five excluded African-Americans would not have been acceptable jurors for the State. This Court should join the numerous other courts that have found counsel ineffective for failing to adequately make a *Batson* challenge when presented with evidence of purposeful discrimination.[29]

Alternatively, even if the Court finds that the record does not provide evidence sufficient to show prejudice, it should join other courts in presuming prejudice where, as here, a *prima facie* case of purposeful discrimination exists and trial counsel fails to adequately make and support a *Batson* objection.[30] As the Supreme Court of Alabama explained in *Yelder*, *Strickland*'s requirement that a petitioner show that his counsel's ineffectiveness was "outcome determinative" makes little sense in the *Batson* context, where no "appellant could prove prejudice unless he relied on the very assumption that *Batson* condemns." 575 So.2d at 139.

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[29] *See Gov't of Virgin Islands v. Forte*, 865 F.2d 59, 64-65 (3d Cir. 1989) (objectively unreasonable for defense counsel to fail to object as prosecutor used peremptory challenges to remove all whites from jury); *State v. Belcher*, 623 N.E.2d 583, 590 (Ohio Ct. App. 1993) (counsel ineffective for failing to make timely *Batson* motion when State removed all three African-Americans from venire); *State v. Williams*, 670 So.2d 275, 276 (Ala. Crim. App. 1996) (counsel ineffective for failing to make *Batson* objection even though *prima facie* case of racial discrimination in jury selection existed; new trial granted); *Robertson*, 630 N.E.2d at 422, 426 (counsel ineffective for failing to make timely and specific *Batson* motion when State challenged three African-Americans from jury panel, leaving only one African-American as alternate).

[30] *See Ex Parte Yelder*, 575 So.2d 137, 139 (Ala. 1991); see also *Triplett v. State*, 666 So.2d 1356, 1362 (Miss. 1995) (citing with approval *Yelder*'s holding that "counsel's failure to raise the *Batson* question at trial was not only ineffective but presumptively prejudicial as well").

That is, proof that Mr. Reeves's trial would have ended differently had more African-Americans been on his jury would rest on the assumption, unacceptable under *Batson*, that African-American jurors would necessarily side with him merely by virtue of their race. The Eleventh Circuit has recognized "this troubling application of the *Strickland* prejudice prong to *Batson*-type claims," *Eagle v. Linahan*, 279 F.3d 926, 943 n.22 (11th Cir. 2001), and has therefore suggested that "where counsel's constitutionally ineffective representation lets stand a structural error that infects the entire trial with an unconstitutional taint, perhaps we should not require the defendant to prove actual prejudice in the outcome of his trial." *Id.* That logic should control here as well.

Therefore, this Court should vacate Mr. Reeves's conviction, and remand this case for a new trial. The petitioner requests an evidentiary hearing on this claim.

PENALTY PHASE CLAIMS

CLAIM VII

DEFENDANT'S SENTENCE SHOULD BE VACATED BECAUSE HE SUFFERS MENTAL RETARDATION AND THEREFORE IS NOT ELIGIBLE FOR THE DEATH PENALTY UNDER THE STANDARDS OF *ATKINS V. VIRGINIA*.

A. Introduction

Mr. Reeves is mentally retarded. That fact alone is sufficient to preclude his execution by the State of Louisiana. The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court of the United States held that the execution of the mentally retarded is "cruel and unusual" for purposes of the Eighth Amendment. "Construing and applying the Eighth Amendment in light of evolving standards of decency," the Court concluded that capital punishment for mentally retarded defendants "is excessive" and therefore "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (internal quotation marks omitted).

Atkins prohibits the execution of Mr. Reeves.

Testing performed by Dr. Terry Strickland, a neuropsycholigist, reveals that Mr. Reeves has a full scale IQ score of 75, placing him within the range of intellectual functioning demonstrating mental retardation. (See Ex. 35, Affidavit from Dr. Tony Strickland.) Additionally substantial documentary evidence exists that indicates Mr. Reeves's adaptive skills