***** CAPITAL CASE *****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEE TURNER, JR., *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CAROLINE W. TILLMAN*
SHANITA FARRIS
1024 ELYSIAN FIELDS AVE.
NEW ORLEANS, LA 70117
(504) 529-5955
ctillman@defendla.org

* *Counsel of Record*

***** CAPITAL CASE *****

QUESTIONS PRESENTED

1. Whether "mere statistics" are sufficient to demonstrate a prima facie case of discrimination under *Batson v. Kentucky,* 475 U.S. 79 (1986) and *Johnson v. California*, 545 U.S. 162 (2005), and whether Mr. Turner demonstrated a prima facie case of discrimination in this case requiring appellate relief.

2. Whether a court reviewing comparative juror analysis presented to demonstrate purposeful decimation under *Batson* may consider reasons distinguishing stricken jurors from those accepted by the prosecutor when the distinguishing factor was not cited in the trial court as a basis for the prosecutor's decision.

3. Whether the evidence in the appellate record, including the prosecutor's disparate strike pattern, failure to question stricken jurors about the issue relied on to explain their removal, disparate questioning of black and white jurors, mischaracterization of juror's responses, evidence of pretext in justifications for removing other black jurors, and comparative juror analysis showing the implausibility of the prosecutor's proffered reasons for striking three black panelists, demonstrated purposeful discrimination requiring appellate relief under *Batson*.

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Lee Turner, Jr., is the Petitioner in this case, and he was represented in the court below by Caroline W. Tillman, Shanita L. Farris, Timothy T. Yazbeck and Christopher J. S. Murrell.

The State of Louisiana is the Respondent in this case and was represented in the court below by the East Baton Rouge District Attorney's Office and Assistant District Attorney Allison M. Rutzen.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lee Turner respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his capital convictions.

OPINIONS BELOW

The Louisiana Supreme Court opinion reversing Mr. Turner's death sentence but affirming his convictions is at *State v. Turner*, 2016-1841 (La. 12/5/18), 263 So. 3d 337. Appendix. A. ("App. A"). Denial of rehearing is at *State v. Turner*, 2016-1841 (La. 01/30/18), 2019 La. LEXIS 326. Appendix. B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court under 28 U.S.C. § 1257. The Louisiana Supreme Court denied Petitioner's appeal on December 5, 2018, and rehearing on January 30, 2019. On April 22, 2019, an extension of time to file the petition for writ of certiorari was granted to and including June 14, 2019, in App. No. 18A1075. Appendix C. This petition follows timely pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. Amend. XIV.

STATEMENT OF THE CASE

Mr. Turner, an African-American man, was convicted and sentenced to death for the 2011 armed-robbery murder of two white men in East Baton Rouge Parish, Louisiana. Despite the double homicide charged, Mr. Turner was not a typical candidate for the death penalty. He was just 21 years old at the time of his arrest and had no prior criminal record. App. A at 5, 48. Evidence at trial revealed that despite having an abusive and traumatic upbringing, Mr. Turner survived his childhood by focusing on school and looking after his younger siblings, successfully graduated high school, and was working and starting a family before his arrest. After his arrest, he was a model inmate throughout his incarceration, as testimony from a corrections expert and the Warden of the local jail confirmed. *Id*. at 8.

On direct appeal, the Louisiana Supreme Court reversed the death sentence due to the trial court's improper restriction of voir dire. *Id.* at 16. However, the court upheld Mr. Turner's convictions, denying relief as to all other claims, including multiple violations of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* at 18-52.

A. Trial: The Prosecutor Engaged in a Pattern of Discriminatory Strikes against Black Prospective Jurors

In a jurisdiction with a long history of pursuing the death penalty in a racially disproportionate manner, race predictably became an issue in the case.[1] Before trial, the defense asked that questions about race be included on jury

[1] While the population of East Baton Rouge is 48% white and 46% black, all ten men currently on death row from the parish are black, and all three men executed since 1976 from the parish are likewise black.

questionnaires.[2] The prosecutor objected claiming that was "inflammatory," but was overruled. The prosecutor then asked that jurors be asked to list their race on the questionnaires. The completed questionnaires were made available to the attorneys prior to trial. Each side had the chance to ask jurors about their responses to questionnaires and to questions asked in court, the state first and then defense.

Jury selection was conducted as follows. Panels of prospective jurors were subjected to *Witherspoon* death qualification, until a sufficient number were qualified to form a panel for general voir dire questioning. Peremptory strikes were exercised at the end of each general voir dire panel, before death qualification of the next batch of prospective jurors resumed. App. A at 25.

In total, 150 individuals were subject to *Witherspoon* questioning, out of which 47 panelists proceeded to general voir dire. Of those, 15 (32%) were black, 2 (4%) were Hispanic and 30 (64%) were white. *Id.*

"Defendant filed a written *Batson* motion after the second round of general voir dire, in which he challenged the state's first six peremptory strikes, five of which were used to exclude black panelists, and one for a Hispanic panelist." *Id.* "[T]he trial court found that the defense had not made a prima facie showing of discriminatory intent, but because 'someone else will be looking at this,' ordered the state to offer race-neutral reasons anyway." *Id.*

[2] Nearly two thirds (64%) of white potential jurors indicated they believed black males are more violent or commit more crimes than other races, in contrast to one fifth (20%) of black potential jurors. All eight minorities peremptorily struck by the prosecutor stated they did not believe black men were more violent or criminal.

For all six challenges, the state pointed to jurors' questionnaire or voir dire responses about the death penalty. For three of the six—including Morgan Weir, Nedra Price and Michael Smith—it relied on jurors' responses showing that they would consider reform, remorse, or capacity for rehabilitation when deciding whether to impose the death penalty. The prosecutor explained that the "defendant planned to focus on his good behavior and capacity to become a reformed prisoner" at sentencing. *Id.* at 31.

i. Nedra Price and Morgan Weir

The record shows that both Morgan Weir and Nedra Price were neutral on the death penalty. "In [Ms. Weir's] questionnaire [she] indicated that the death penalty is "sad" but sometimes necessary." She confirmed during testimony that that "she agree[d] with the fact the death penalty is an option for certain murders, including when more than one person was murdered." App. A at 28.

Nedra Price likewise indicated her belief that the death penalty is appropriate in some cases. ("Case by case scenario. Depends on the facts of the murder.") ("Sometimes it's necessary, sometimes it's not.") ("I believe the death penalty should/can be used appropriately but it's not necessary always."). She appeared a favorable juror for the state in this case because she indicated that life without parole was most appropriate in cases involving "only one homicide."

When ordered to explain her strikes, the prosecutor explained that Ms. Weir had "'expressed a great deal of concern through body language as well as her comments on the record' as to the police interrogation techniques involving misrepresentations; she asked a question about the difference between first and

second degree murder." *Id.* at 28. The state's main focus when explaining Weir's removal—and its *only* reason for striking Price—was their stance on the death penalty and their responses as to the relevance of a defendant's remorse, potential for reform and recidivism when deciding whether to impose death. The state quoted at length from their questionnaires and testimony.

> As to Ms. Weir, the prosecutor stated:
>
> > she "expressed a very serious concern about imposing the death penalty and when it might be necessary"; she felt the best reason to impose the death penalty was if the person was "a threat to others multiple times and all other options have been exhausted"; she felt remorse and taking responsibility were reasons not to impose the death penalty; and, again, [] "she would need to know this person is not going to stop hurting people" in order to impose the death penalty. The state further explained its concern that in light of the planned defense mitigation witnesses, "Ms. Weir's focus on whether or not this individual will stop hurting people would take a priority in her mind over what this man actually did."

Id. This was a significant distortion of Ms. Weir's responses. As the Louisiana Supreme Court found, "the state's characterization of Ms. Weir as having a 'very serious concern' about imposing the death penalty is an overstatement. Both her responses on the questionnaire and during questioning indicated that she felt the death penalty was appropriate in certain circumstances." *Id.* She did not "need to know" that the defendant "is not going to stop hurting people" to vote for death, but cited that circumstance as "the *best*—but not the *only*—reason to impose the death penalty." *Id.* Similarly, her "focus" on whether the person "is not going to stop hurting people" did not "take priority" over "the facts of the case"; when asked what would be important to her at sentencing, her "focus" was on the crime: "How it occurred, when it occurred, why it may have occurred."

"The state never questioned Ms. Weir concerning these responses." *Id*. at 29.

As to Nedra Price, the prosecutor stated:

> Ms. Price "wants to know the remorse, the lack of recidivism" and that youthfulness was also important to her. The state also referenced Ms. Price's comment that sometimes people could come out of prison and pose no future threat, and the state further noted that, on her questionnaire, when asked under what circumstances she thought life imprisonment without parole was appropriate, she responded "if a person is highly unlikely to commit the crime again." The state explained its concern with Ms. Price was "her focus[] on that risk of recidivism," given that defendant planned to focus on his good behavior and his capacity to be a reformed prisoner, she would be susceptible to this defense argument, and thus the state struck her for this reason.

Id. at 31. The State did not ask Ms. Price about any of these responses, and also mischaracterized her questionnaire. While Ms. Price did write that life would be appropriate "if a person is highly unlikely to commit the crime again," the prosecutor omitted her qualification, ". . . and it is based on one homicide," which took Mr. Turner's case out of the life category for her.

Ms. Price and Ms. Weir's emphasis on "remorse" at sentencing, cited by the prosecutor in her reasons for removing both, also favored the State who "sought to highlight [the defendant's] lack of remorse" in its case for death. *Id.* at 37.

The defense challenged the credibility of the State's reasons. It objected that many of the minority jurors "have the same answers as the white jurors. But she didn't cut the white jurors, she cut the minorities." Counsel referred to white venire members, including Malcolm Jarrell, Peggy Twyman, and Winter Phelps. The defense requested more time to review the record and supplement with a more complete comparative juror analysis, but that request was denied.

The trial court found that the State's reasons for removing Ms. Price and Ms. Weir were race neutral and overruled the *Batson* objections. *Id.* at 28-31.

ii. Lanell Craig

After the third general voir dire panel, "[t]he State used its seventh peremptory challenge against Lanell Craig a black female." App. A at 34. "At the time it made the challenge, the state had used six of its seven strikes to remove black jurors, with the other strike being used to remove a Hispanic juror." *Id.* The state had therefore used "roughly 85% of it challenges" against black jurors and 0% against whites. *Id.* Defense counsel objected under *Batson* because "this continues to still be a pattern." *Id.* The trial court disagreed: "I didn't find there was a pattern, I made her give her reasons and found her reasons were race neutral." *Id.* The court overruled the objection without asking the state to proffer reasons for the strike. *Id.*

iii. Michael Smith

Having survived seven *Batson* objections, the state used its next three strikes to remove white jurors before using its 11th to back strike yet another black man, Michael Smith, who was death qualified on the first panel.[3] App. A. at 35. Mr. Smith was an ideal juror for the state given the facts of this case. His questionnaire reflected that "he had an overall good impression of law enforcement" and "was generally in favor of the death penalty." *Id.* In voir dire, he testified that he had

[3] In Louisiana, the practice of back striking jurors is a method for delaying the use of a peremptory strike until after a juror has survived initial peremptory strikes and has been accepted to sit on the jury but not sworn in. Louisiana state and federal judges have recognized that back striking may be an indicia of an intent to discriminate against jurors. *See, e.g., Williams v. Cain*, 2009 WL 1269282 (E.D. La 2009) (holding that defense counsel failed to establish an inference of discrimination where "the State struck several potential African American jurors [but] did not use any back strikes in the process"); *State v. Weary*, 03-3067 (La. 04/24/06), 931 So. 2d 297, 337 (Johnson, J. dissenting) (noting that, when back striking is used, it "is impossible [for trial counsel] to see the pattern of [] discrimination"), rev'd in related proceeding, *Wearry v. Cain*, 136 S.Ct. 1002 (2016).

been the victim of an armed robbery, and would "probably vote for [the death penalty]" for a "defendant whose robbed and killed two people during an armed robbery." *Id.*

Defense objected under *Batson*. The court found no prima facie case because there was still no "pattern" but asked the state to give reasons. *Id.* It had only one:

> [T]hat it "boil[ed] down to one thing" from Mr. Smith's questionnaire that the state "just cannot let go of," and that was his response to "what is the best reason not to impose the death penalty?" Mr. Smith's response was "to reform a person." The state further noted that it knew the defense would be calling witnesses to talk about how defendant had not caused any problems in prison, and the prosecutor noted that she "just can't let go of that."

Id. However, as with Weir and Price, "the state never questioned Mr. Smith about that response at all." *Id.* at 36. In fact it had probed Mr. Smith very little about his views on the death penalty when his favor for it was clear.

The defense challenged the credibility of the state's alleged reason, pointing out Mr. Smith's pro death-penalty stance. Defense summarized Smith's testimony that he would probably vote for death on the facts of this case and would consider "remorse and redemption;" he "would want him to be remorseful." The prosecutor then tacked on Smith's reference to remorse as another reason for the strike: "that goes back to the problem, the remorse and the redemption." *Id.* at 35. However, "a juror to whom remorse was important was a good juror for the state." *Id.* at 37.

The trial court accepted the State's reason and overruled the challenge. *Id.* Ultimately, "although the parish is nearly 50% black, only two black people served on this jury in this interracial murder case." *Id.* at 24. Of those, only one was

accepted by the state, and the second was seated after the State exhausted its peremptory strikes. *Id.* at 37.

B. Direct Appeal

Mr. Turner challenged the trial court's *Batson* rulings on direct appeal, including those relating to Lanell Craig, Morgan Weir, Nedra Price and Michael Smith. Mr. Turner laid out evidence in the record of discrimination and the pretextual nature of the State's justifications for strikes. This included an inter-racial crime; the pattern of strikes against minorities; the use of back strikes and the order of strikes (the state began striking white jurors only after surviving seven *Batson* objections when its strikes were running out); and the state's failure to ask jurors about the responses it purportedly took issue with. App. A at 24-39.

Mr. Turner also presented comparative juror analysis. *See*, *e.g.*, *id.* at 28-31, 33-36. He identified over a dozen white jurors who, like Weir, Price and Smith, had noted the relevance of remorse, reform, or rehabilitation in their questionnaires or testimony, whom the state did not strike. White jurors accepted by the State, Nella Barnard, Winter Phelps, Malcolm Jarrell, Kristen Procell, and Patricia Borskey, all checked a questionnaire answer that "people in prison have the opportunity to turn their life around and seek forgiveness and peace," as did numerous white jurors accepted by the state before being struck by defense (Gwen Grass, Patricia Saucier, Betsy Rains, Tammy Salter, Mary Johnson, and Allison Halphen). *Id.* at 36.[4] Johnson and Salter endorsed that "our penalties and sentences are too harsh; we

[4] In *Miller-El*, this Court relied upon white jurors accepted by the state but stricken by the defense in its comparative juror analysis. *Miller El,* 545 U.S. at 248.

need to focus on rehabilitation." *Id*. Ms. Twyman wrote that the "best reason" not to impose death was "isolated incident." Ms. Bernard said the "best reason" not to was "no prior violence." Ms. Saucier wrote the "best reason" *to* impose it, was "if there is no doubt that he/she would kill again." *Id.* at 29. Ms. Borskey testified that "remorse" is important in considering life over death. *Id.* at 31. Mr. Jarrell referenced remorse twice in his questionnaire, and testified that when deciding penalty he would consider "how remorseful someone" is, and "whether they would be a danger to other people in a correctional system." *Id.* at 29. None were stricken by the state.

Defense pointed out that many of those jurors were weaker on the death penalty than the black jurors struck, especially Mr. Smith. *Id.* at 37 n.24. For example, Mr. Jarrell testified during voir dire that he although he could "imagine a scenario that I might be able to [vote for death] . . . it would have to be some egregious circumstances about it," and acknowledged it would be an uphill climb "to get to that point." Ms. Barnard testified she was "not overly in favor of the death penalty" but could vote for it if she thought it was "necessary." Ms. Phelps felt the death penalty should be reserved for special cases such as child killers or serial killers—not Mr. Turner's case. The state also accepted white juror Suzanne Carter, whose hesitation about the death penalty was a matter of express concern for the state during voir dire. She favored abolition, expressed relief that the previous capital trial she served on ended in a mistrial, testified that she may be predisposed

to a life sentence, and stated she might "err towards life out of fear of making a mistake."

White jurors Borskey, Barnard, Phelps and Carter were among ten white jurors who expressed concern about the interrogation techniques used to extract Turner's confession, another reason relied upon by the state to justify its strike of Morgan Weir and other minority jurors. *See id.* at 30, 30 n.22. Patricia Borskey testified she "does not like the fact that police are allowed to lie to make someone come up to the truth just because they get tired of someone badgering them, and perhaps they coerced a confession that isn't really true." *Id.* at 34. Ms. Barnard testified she had "problems with" a lack of time limits on interrogations and "constant drilling . . . I think that should not be used." Phelps testified that she had difficulty with police lying to suspects. Carter expressed concern about lengthy interrogations, "because if I get questions for 12, 14 hours straight, I'm going to be delirious." *Id.* Yet, unlike Morgan Weir none were stricken for these views. Neither Michael Smith nor Nedra Price had any problem with the interrogation techniques discussed and both were stronger on the death penalty that most of these white jurors. Mr. Smith was stronger than them all. *See id.* at 37 n.24.

Defense identified broader patterns in the prosecutor's conduct during voir dire indicative of pretext. Defense presented evidence of disparate questioning of black and white jurors, another factor this Court has recognized to indicate discriminatory intent. *Id.* at 38-39. Quoting examples from the record, the defense argued that "the state 'tended to' question black jurors more aggressively about

their views on the death penalty, displaying 'significantly' more skepticism about their ability to vote for the death penalty, and distrust of their assurances that they could." *Id.* In contrast, "the state 'tended to' be more accepting of white jurors' ability to consider death, even questioning many blatant pro-life jurors in ways designed to produce 'correct answers.'" *Id.* at 39.

Defense also presented proof of the state's disparate questioning of black and white jurors about their experiences of crime, a factor well known to create risk of bias. *Id.* at 39. A total of 32 jurors wrote on their questionnaire that they or a loved one had been a victim of armed robbery or homicide. Although more white jurors indicated this potential source of bias, the state was more than twice as likely to ask black jurors about their experience as white jurors. *Id.* It addressed the topic with 8 of 12 (66.67%) black jurors—including Morgan Weir, Lanell Craig and Michael Smith—but barely a quarter of white jurors, only 5 of 19 (26.32%). *Id.*[5]

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[5] The prosecutor also used more emotive language when raising the topic with black jurors and often raised the topic up front. For example, the state began its questioning of Nedra Price by asking about her sister's murder:

> I reviewed your form. And you just went through a really horrible experience in the early 90s. . . . Not to cause you to dwell on something so terribly sad, but I just need to know whether or not you think that would influence you in any way as a juror. You actually witnessed this happen?

Early in its questioning of Ms. Craig, the state asked about her brother's murder:

> Four years ago is not that long. And here we are asking you this week to possibly serve on a case dealing with a homicide, a double homicide. Two people were killed in this case. Are we putting you in any type of uncomfortable situation asking you to sit here? We will be introducing evidence of autopsy photographs.

It asked Michael Smith in detail about being the victim of an armed robbery, and questioned Ms. Weir about the armed robbery of her friend.

Yet, it did not ask the majority of white jurors about such experiences at all. It did not question Patricia Borskey about the homicide of her son; nor Peggy Twyman about how a maintenance man

Finally, Mr. Turner presented evidence that the state's reasons for striking the other minority jurors were pretextual, *id*. at 26-34, providing further evidence of the state's discriminatory intent during voir dire. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).[6]

Mr. Turner argued error in the trial court's failure to find a prima facie case of discrimination after the strike of Lanell Craig. With respect to the other strikes, Mr. Turner argued that the race-neutral reasons provided by the prosecutor did not withstand scrutiny in light of all relevant circumstances including comparative juror analysis. The Louisiana Supreme Court upheld the trial court's rulings.

i. Prima Facie Case Finding: Lanell Craig

As to the *Batson* claim regarding Lanell Craig which the trial court denied at step-one, the Louisiana Supreme Court cited *Johnson v. California* and acknowledged that the statistical evidence presented could raise an inference of discrimination:

> [t]he state's use of six of seven strikes exercised against black jurors, or roughly 85% of its challenges, could support a conclusion that the trial judge did abuse his discretion in finding that the defense had failed to pass *Batson's* first step." *Cf. Johnson v. California,* 545 U.S. 162, 170 (2005) (because *Batson* did not mean to impose an onerous burden as the first step in its analysis, a defendant need produce only "evidence

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followed her cousin into her home, then shot and killed her boyfriend; nor Sheri Harris about how her grandfather was murdered by acquaintances who came to his house to rob him, a scenario resembling the facts of Mr. Turner's case.

[6] Defense presented evidence of pretext in the state's reasons for striking Denise Malancon, including that the state misrepresented several of her responses and seemed "primarily concerned with Ms. Malancon's potential focus on remorse" when "the state's strategy of showing that he was not, in fact, remorseful, would tend to negate this concern." *Id.* at 33. Defense highlighted similar mischaracterizations of the juror's responses by the state in its reasons for striking Ernest Watson and Brandi Guidry. *See id.* at 26-27. Comparative juror analysis of the state's treatment of venire members who expressed concerns about police interrogation techniques demonstrated pretext in its reasons for striking Savannah Jule. *Id.* at 34.

> sufficient to permit the trial judge to draw an inference that discrimination has occurred.").

App. A at 34. Yet, it found otherwise. The court cited its pre-*Johnson* decisions that as a matter of law "bare statistics alone are insufficient to show a prima facie case of discrimination." *Id.* (citing *State v. Duncan,* 99-2615 (La. 10/16/01) 802 So. 2d 533, 550) (citing *United States v. Moore,* 895 F.3d 484, 485 (8th Cir. 1990)). It also quoted its case law acknowledging that this approach was "inconsistent" with "the reference in *Batson* to a 'pattern' of strikes," *id.* at 35, but nonetheless applied it.

Having made clear that the pattern of strikes alleged was insufficient, it then found that in this case the pattern should not be considered at all because the trial court had already denied *Batson* challenges to six of the seven strikes:

> Having found no purposeful discrimination concerning the state's first six strikes it is difficult to see how defendant can show, without more, that the seventh strike continued a discriminatory pattern which the trial court justifiably found not to exist.

Id. Finally, disregarding all of the other evidence of discrimination in the record, it found that "defendant has failed to offer any other evidence from which to infer discriminatory intent" and denied the claim. *Id.*

ii. Step-Three Findings: Morgan Weir, Nedra Price and Michael Smith

The Louisiana Supreme Court held that Mr. Turner failed to meet his burden of proving discrimination with respect to the other strikes, crediting the state's asserted race-neutral reasons. For all three jurors, the court rejected Mr. Turner's comparative juror analysis by relying on characteristics of the non-stricken white jurors which, though never mentioned by the state at trial, might have made them

more favorable to the state than the black jurors struck. The court cited to the Fifth Circuit's similar approach to comparative juror analysis in *Hebert v. Rogers*, 890 F.3d 213, 223 (5th Cir. 2018), which relied on the Fifth Circuit's recent holding in *Chamberlin v. Fisher*, 885 F.3d 939 (5th Cir. 2018). App. A at 29. It also quoted its own pre-*Miller-El* precedent in *State v. Juniors*, 03-2425, (La. 6/29/05), 915 So. 2d 291, 317-18):

> "[T]he fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted juror may have exhibited traits which the prosecutor could have reasonably believed would make him desirable as a juror. "

Id. The court also refused to consider comparisons of jurors at all unless the white jurors articulated their comparable views in a virtually identical manner.

a. Morgan Weir

As to Morgan Weir, the Louisiana Supreme Court acknowledged significant evidence of pretext and discrimination in the record. The court found that "despite the state's apparent concern over Ms. Weir's responses, the state never questioned Ms. Weir concerning these responses, which this Court has found to be an indication of discriminatory pretext." App. A at 28-29. It recognized that "the state's characterization of Ms. Weir as having a 'very serious concern' about imposing the death penalty is an overstatement." *Id.* at 28. It found the state's claim that she "'would need to know this person is not going to stop hurting people [in order to vote for the death penalty]' is a mischaracterization of her responses, and is unpersuasive as a genuinely race-neutral justification for striking Ms. Weir." *Id.*

The court also appeared to acknowledge the comparative juror evidence: "there were several white jurors . . . none of whom the state struck, who gave similar answers that indicated they would want to know a person's proclivity for violence and risk of recidivism in determining whether to impose a life sentence or the death penalty." *Id.* However, citing *Hebert* and *Juniors,* it disregarded that evidence based on isolated responses of white jurors that could have led the trial prosecutor to favor them over Ms. Weir. *Id.*

For example, the court acknowledged that "similar to Ms. Weir", Ms. Saucier stated that the "best reason for imposing the death penalty was 'if there is no doubt that he/she would impose this on another victim.'" *Id* at 29. However, the court found she was distinguishable by her responses to *other* questionnaire items which were not relied on by the state at trial: she "also indicated she thought the death penalty was used appropriately, failed to list any reasons why the death penalty should not be imposed or any circumstance where a life sentence without parole would be appropriate, and indicated that she was "generally in favor of the death penalty and feel it should be imposed upon conviction of murder, with very few exceptions." *Id.*

The court acknowledged that white juror Mr. Jarrell highlighted recidivism as a factor he would consider at sentencing. But it discounted this evidence by finding that Mr. Jarrell was not "as focused" on recidivism as Ms. Weir and was distinguishable by his responses to *other* questionnaire items:

> Defendant fails to point out that Mr. Jarrell differed in other ways from Ms. Weir. Notably Mr. Jarell agreed with the statement, "We are

> too lenient on criminals; people who break the law deserve harsher punishment." Additionally, when asked how he would feel if Louisiana repealed the death penalty, he remarked that he "prefer[s] the state keep the death penalty as an option.

Id. The court found that Ms. Bernard's responses were not comparable at all. It acknowledged her questionnaire response that the best reason not to impose death was if the defendant "exhibited no prior violence" and that she stated she would want to know if the defendant exhibited had a pattern of using excess violence when considering the death penalty. But because she did not expressly discuss how this was relevant to a defendant's future behavior, it found she was not "similarly situated . . . on the issue of recidivism." *Id.* at 29-30. It did not discuss the other comparable white jurors.

The court rejected the comparative juror evidence about interrogation techniques without conducting any analysis. It reasoned that the prosecutor relied in part on Weir's "body language," which was unreviewable on a cold record, and so concluded the evidence was "unpersuasive." *Id.* at 30.

Notwithstanding its express finding that some of the state's reasons were "implausible," and without discussing the other evidence of pretext before it, the court found "no error in the denial of is *Batson* motion with respect to Ms. Weir." *Id.*

b. Nedra Price

The court rejected the comparative juror evidence as to Ms. Price using a similar analysis. It acknowledged that white juror Mr. Jarrell had highlighted recidivism as a factor he would consider at sentencing, as had Ms. Price. But it

discounted that evidence because Mr. Jarrell was not "as focused" on recidivism as Ms. Price and was distinguishable by his responses to *other* questionnaire items:

> Defendant fails to point out that Mr. Jarrell differed from Ms. Price in other significant ways. Notably, Mr. Jarrell agreed with the statement, "We are too lenient on criminals; people who break the law deserve harsher punishment." And, when asked how he would feel if Louisiana repealed the death penalty, he remarked that he "prefer[s] the state keep the death penalty as an option."

App. A at 31. The court found that Ms. Borskey's responses were not comparable at all. It acknowledged that Ms. Borskey checked the questionnaire box about people in prison having the opportunity to turn their life around, and that she testified remorse was important in determining life, but concluded she was "not similarly situated." *Id.* The court did not discuss any of the other similar white jurors, nor the other evidence demonstrating pretext before it (mischaracterization of juror's responses, failure to question the juror about the cited topic; disparate questioning, pattern of strikes; inter-racial crime), simply denying the claim based on its comparative juror analysis. *Id.*

c. Michael Smith

The Louisiana Supreme Court recognized that the state's failure to question Mr. Smith about the single questionnaire response it could not "let go of," "undercut[] the persuasiveness" of its proffered race-neutral reason. App. A at 36. However, it went on to deny the claim after conducting comparative juror analysis.

The court refused to consider comparative juror evidence as to *any* of the multiple white jurors who indicated the relevance of remorse or reform to sentencing, because they did not do so in the same place on the questionnaire as

Michael Smith or express their views in exactly the same manner. *Id.* The court found that the views of jurors who agreed with the statement that a person may have the opportunity to be reformed in prison were not "equivalent" to someone who said that the "best reason" not to impose death was reform. *Id.* The court distinguished jurors who checked the box on the form endorsing the view that "our penalties and sentences are too harsh; we need to focus on rehabilitation," noting that neither responded to question 84 with any reference to reform, unlike Michael Smith. *Id.* The court even distinguished jurors Twyman and Bernard, whose answer to question 84 about the best reason not to vote for death—"[an] isolated incident," and "no prior violence,"—*did* relate to reform, because they did not use identical language. *Id.* It distinguished Ms. Saucier, who responded to the related question that the best reason to impose death was "[i]f there is no doubt that he/she would impose this on another victim." The court found that none of these responses were focused on "the potential for reform." *Id.* It did not mention Malcom Jarell at all.

Applying the *Hebert*/*Chamberlin* reasoning, the court also discounted Mr. Turner's evidence that the State failed to strike white jurors who were not merely equivalent to Smith but *far less favorable* than him:

> As with earlier comparisons defendant attempts to make in the Batson context, each white juror whom defendant points to differs significantly enough from Mr. Smith in other ways so as to preclude any meaningful comparison and negate any inference of discriminatory intent.

Id. at 37 n.24. It did not identify any of these "differ[ences]." In a similar manner, the court brushed aside evidence that Smith had no problem with the interrogation techniques used to extract Mr. Turner's confession, in contrast to the many white

jurors accepted by the State who did display such concerns and were weaker on the death penalty. Rejecting this evidence, the court held:

> As noted above, the fact that the state did not strike similarly situated white jurors is not, alone, grounds to find the reason for the strike pretextual, because the seated juror "may have exhibited traits which the prosecutor could have reasonably believed would make him desirably as a juror."

Id. It gave no examples of these "traits."

Finally, the court discounted the evidence of discriminatory intent demonstrated by the state's effort to bolster its sole reason for striking Smith with a post-hoc justification that was equally implausible (his interest in "remorse," which made Smith more favorable to the state). It did so only by surmising that the state did not mean "remorse" when it used that term—even though it clearly relied on "remorse" as an equally implausible reason for striking other black jurors. *Id.* at 37.

The court found the evidence of discriminatory intent evident in the prosecutor's broader patterns of conduct in voir dire equally unconvincing. It discounted the disparate questioning evidence because it was "not as persuasive as in *Miller-El"* and because Turner's case did not involve a jury shuffle, comparative juror evidence, or other *Miller-El* type evidence. *Id.* at 38-39. Mirroring the prima facie case analysis it used in assessing the strike of Lanell Craig, it discounted the State's pattern of strikes as evidence of discrimination at step three because the court denied *Batson* challenges to the earlier strikes. *Id.* at 38. It did not consider

evidence of discriminatory intent that it recognized when denying *Batson* challenges to any of the other jurors.[7]

It found no abuse of discretion in any of the trial court's *Batson* rulings.

REASONS FOR GRANTING THE PETITION

The Louisiana Supreme Court's analysis cements two splits within the circuits regarding the proper assessment of allegations of discrimination in jury selection under *Batson*. In each instance, Louisiana joins a single outlier Circuit Court and adopts a restrictive interpretation at odds with all other Circuits and this Court's precedents.

First, the Louisiana Supreme Court holds as a matter of law that statistics cannot make out a prima facie case of discrimination. This conflicts with the approach of all but one Circuits, and undermines the holding of *Johnson v. California*, that to demonstrate a prima facie case, a defendant need only show the mere "inference of discrimination." *Johnson v. California*, 545 U.S. 162, 170 (2005). Only the Eighth Circuit, which has yet to consider the issue in light of *Johnson*, continues to take this restrictive approach. In this case, the Louisiana Supreme Court recognized the conflict between its case law and *Johnson*, yet ultimately prioritized its own outdated precedent.

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[7] The court recognized evidence of pretext regarding the state's strike of Denise Malancon, including the fact that the prosecutor mischaracterized several of her responses, and that "although the state appeared primarily concerned with Ms. Malancon's potential focus on remorse, the state's strategy of showing that he was, in fact, remorseful, would tend to negate this concern." *Id.* at 33. The court similarly recognized that the prosecutor mischaracterized Brandi Guidry's testimony, *id.* at 26, and may even have confused her with another black juror. *Id.* Regardless of whether the court found those *Batson* claims proven, it should have taken this evidence of discriminatory intent into account when considering the credibility of the State's reasons given for striking all the other jurors.

Second, the Louisiana Supreme Court joins the Fifth Circuit in holding that comparative juror evidence offered to prove discrimination may be disregarded if there is any basis in the record for distinguishing non-stricken white jurors, even if the reason was never mentioned by the prosecutor at trial. Not only does this dramatically undermine the utility of what this Court has recognized to be a vital tool in ferreting out discrimination, it conflicts with precedents of this Court that in assessing a prosecutor's actual motivation for a strike, the prosecutor must "stand or fall upon the reasons he gave" at trial. *Miller-El v. Dretke*, 545 U.S 231, 252 (2005). All other Circuits to address the issue have applied *Miller-El*'s clear terms.

This is an ideal opportunity for the Court to address these unresolved issues in a case involving classic indicia of discrimination, which so clearly illustrates how these restrictive interpretations of the Court's precedents undermine *Batson*'s force. It also allows the Court to address Louisiana's continued failure to implement the Court's precedents in this important area of federal law.

As a direct appeal case, it is free from the strictures of habeas and has no procedural problems. It therefore provides a clear vehicle for the Court.

I. THE COURT SHOULD GRANT THE WRIT TO CORRECT LOUISIANA AND THE EIGHTH CIRCUIT'S ANACHRONISTIC RULE THAT MERE STATISTICS ARE INSUFFICIENT TO PROVE A PRIMA FACIE CASE

The three-step inquiry established by *Batson* was designed to more effectively "enforce[] the mandate of equal protection" during jury selection. *Batson,* 476 U.S. at 99. Recognizing that the Constitution prohibits the exclusion of just one juror based upon race, the Court obviated the need for defendants to prove a prosecutor's

history of discrimination in multiple cases, holding that evidence of discrimination in the record of the pending case could suffice. *Id.* (reversing *Swain v. Alabama*, 380 U.S. 202 (1965)). In *Johnson v. California*, the Court emphasized the minimal showing needed at step one to trigger a trial court's further inquiry under this framework. *Johnson*, 545 U.S. at 172. As the Court explained, "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Id.* "The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id*. The Court made clear:

> We did not intend the 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 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 (emphasis added).

A statistically disproportionate use of strikes to remove a member of one particular race reasonably raises that inference. This Court explicitly found as much in *Batson* itself: "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. *See Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 342 (2003) ("statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors").

However, the Louisiana Supreme Court holds, as a matter of law, that "bare statistics" cannot make out a prima facie case of discrimination. *See*, *e.g.*, *State v. Dorsey*, 2010-0216 (La. 09/07/11), 74 So. 3d 603; *Duncan*, 802 So. 2d at 550; *State v. Holand*, 2011-0974 (La. 11/18/11), 125 So. 3d 416 (court of appeals erred when it found a prima facie case of discrimination based upon the state's use of "11 peremptory challenges to exclude 10 African-Americans"). *Cf State v. Simon*, 51-778 (La. App. 2 Cir 01/10/18), 245 So. 3d 1149, 1164 (no prima facie case where state used 4 of 5 strikes to remove black jurors); *State v. Henderson*, 2013-0074 (La. App. 1 Cir 09/13/13), 135 So. 3d 36, 46 ("bare statistics" insufficient); *State v. McElveen*, 2010-0172 (La. App. 4 Cir 09/28/11), 73 So. 3d 1033, 1059 (no prima facie case where prosecutor struck 12 black jurors).

The question of whether "bare statistics" is sufficient to meet a prima facie case is a significant issue, as often a defendant (or proponent of a *Batson* challenge) will have nothing but unexplained statistics as a basis for a prima facie case.

The Louisiana Supreme Court joins a minority of one Circuit Court of Appeal in answering that question in the negative. While the Eighth Circuit has yet to consider the issue in light of *Johnson*, Louisiana clings to its old precedent despite recognizing its inconsistency with *Johnson*. In many cases, this leaves defendants no better off than they would have been under *Swain*.[8]

[8] *Cf State v. McClinton*, 492 So. 2d 162, 164 (La. Ct. App. 1986) (prosecutor's strikes of 12 black jurors insufficient to show prima facie case under *Swain*); *State v. Wagster*, 489 So. 2d 1299, 1305 (La. Ct. App. 1986) (same); *State v. Hayes*, 414 So. 2d 717, 720 (La. 1982) (prosecutor's use of 14 of 18 challenges to remove black jurors where only one black person served on the jury insufficient to prove prima facie case under *Swain*).

The Court's intervention is required to correct this anachronistic rule and ensure the effective application of *Batson*.

A. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeal Hold That Bare Statistics Are Sufficient to Make Out a Prima Facie Case of Discrimination

All Circuit Courts of Appeal, except the Eighth Circuit, have definitively found or affirmed prima facie cases of discrimination by considering only a prosecutor's disparate pattern of strikes. Some Circuits were initially equivocal on the issue. However, since *Johnson* was decided, all Circuits but the Eighth recognize that statistics alone can be sufficient.

After a long period of indecision, *see*, *e.g.*, *United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008) ("we have never decided whether mere numbers may establish a prima facie case"), the First Circuit answered the question affirmatively: "[D]emonstrating a pattern of strikes against members of a cognizable group may raise an inference of discrimination against a particular juror." *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir. 2014).

The Second Circuit has long concluded the same because, as that court explained, there is often "little to go on besides the statistics." *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) ("[T]he fact that the government tried to strike the only three blacks who were on the panel constitutes a sufficiently dramatic pattern of actions to make out a prima facie case.").

The Third and Fourth Circuits have been clear for many years: "[s]tatistical evidence may be sufficient in itself to make out a prima facie case of racial discrimination." *Williams v. Beard*, 637 F.3d 195, 214 (3d Cir. 2011) (citing *Jones v.*

Ryan, 987 F.2d 960, 971 (3d Cir. 1993)); *Chandler v. Greene*, 1998 U.S. App. LEXIS 10196, at *14 (4th Cir. 1998) ("Where the prosecutor's pattern of strikes against black jurors reasonably gives rise to an inference of discrimination, the prosecutor must articulate a race-neutral explanation for the challenges") (citing *Howard v. Moore*, 131 F.3d 399, 407 (4th Cir. 1997) (en banc) (removal of six out of seven black prospective jurors constituted prima facie case)).

Although some of the Fifth Circuit's earlier decisions were equivocal and referenced early Eighth Circuit precedents to the contrary, since *Johnson* the Fifth Circuit recognizes that a pattern of excluding members of a particular race is sufficient to demonstrate a prima facie case. In *Washington v. Thaler*, the court emphasized that under *Johnson v. California*, "the facts required to raise an inference are a 'light burden'" and found that "the removal of non-white jurors from the venire raises an inference that the prosecutor exercised peremptory challenges on the basis of race." *Washington v. Thaler*, 464 Fed. Appx 233, 238 (5th Cir. 2012) (citing *Price v. Cain*, 560 F.3d 284, 286 (5th Cir. 2009) (*Johnson* imposes a "light burden") (reversing district court's denial of habeas relief, finding that trial court unreasonably applied *Johnson* where the state used 6 of 12 peremptories to remove black jurors and jury was all-white)). *See also Smith v. Cain*, 708 F.3d 628 (5th Cir. 2013) (trial court unreasonably applied *Batson* when it found state's strike of three blacks in a row from one panel did not meet prima facie burden).

The Sixth, Seventh, Ninth, Tenth and Eleventh Circuits agree: "An inference of discrimination may be raised if there was a pattern of strikes against jurors of . . .

a particular race." *United States v. Ervin*, 266 F. App'x 428, 432 (6th Cir. 2008); *United States v. Stephens*, 421 F.3d 503, 518 (7th Cir. 2005) (finding prima facie case based upon numbers);[9] *Paulino v. Castro*, 371 F.3d 1083, 1091 (9th Cir. 2004) (prima facie case proven where five of the prosecutor's six strikes at the time of objection were against minorities); *United States v. DeGross*, 913 F.2d 1417, 1425 (9th Cir. 1990) (use of seven out of eight peremptory strikes against men raised inference of gender discrimination); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991) (statistical comparisons such as strike rate or disproportionate use of strikes sufficient); *Adkins v. Warden*, 710 F.3d 1241, 1255 (11th Cir. 2013) (noting the "strength of Mr. Adkins's prima facie case for discrimination" based upon prosecutor's "pattern of strikes" where state struck nine of eleven black jurors (83% strike rate) and only one black person served on the jury).

B. The Louisiana Supreme Court Continues to Rely on the Eighth Circuit's Outdated Precedent That Bare Statistics Cannot Constitute a Prima Facie Case

Of the Courts of Appeal, only the Eighth Circuit has yet to consider the question in light of *Johnson*. Under its old precedents, it therefore continues to hold as a matter of law that statistics alone are insufficient to support a prima facie case of discrimination. *See United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990) (because this first step is "necessarily fact-intensive," a defendant must "come forward with *facts*, not just numbers alone") (emphasis in original). It therefore

[9] *Stephens* remanded the case to the district court for consideration of the step two and three analysis, where the court found a *Batson* violation; the Seventh Circuit later reversed on these grounds, after the entire analysis was complete. *See United States v. Stephens*, 514 F.3d 703 (7th Cir. 2008).

requires that "a defendant who requests a prima facie finding of purposeful discrimination is obligated to develop [some] record, beyond numbers, in support." *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir. 1990) (finding no prima facie case where the state used six of seven strikes to exclude African-Americans because "numbers alone are not sufficient to establish or negate a prima facie case"). *See also Luckett v. Kemna*, 203 F.3d 1052, 1054 (8th Cir. 2000) (prosecutor's use of eight of nine peremptory challenges to exclude African-Americans insufficient).

It is this line of pre-*Johnson* cases from the Eighth Circuit that the Louisiana Supreme Court relied upon—and post-*Johnson* continues to rely upon—in adopting the same restrictive categorical approach. App. A. at 34 (discussing *Duncan,* 802 So. 2d at 550 (citing *Moore,* 895 F.2d at 485)). Unlike the Eighth Circuit, it does so despite recognizing the inconsistency with *Johnson*.

C. The Prima Facie Case Analysis in this Case Represents a Particularly Extreme Departure from Johnson

The Louisiana Supreme Court's treatment of the statistical evidence in this case exemplifies the need for this Court's intervention, because it represents a particularly extreme departure from *Johnson*. Not only did the court refuse to recognize the statistical pattern of strikes as sufficient to meet *Batson's* threshold inquiry with respect to Lanell Craig, but it disregarded the pattern of strikes completely, on the basis that *Batson* challenges regarding those strikes had already been denied. App. A at 35. By doing so the court essentially required the defendant to have *proven* discrimination in each of the earlier strikes (meeting the step-three

burden) before relying on them as part of his showing of a prima facie case of discrimination for the later strikes. This is untenable under *Johnson.*[10]

The issue of whether bare statistics can make out a prima facie case of discrimination is a critical threshold inquiry that determines the reach of *Batson*. In the majority of trial cases, all a proponent of a *Batson* objection will have is "bare statistics" to provide indicia of discrimination. Unless a prosecutor voluntarily provides reasons or the trial court orders reasons be given notwithstanding the legal insufficiency of the prima facie case showing under Louisiana law, defendants in such cases will have no means to ferret out the discriminatory intent and safeguard their Constitutional rights. Most courts have adopted the broader approach under *Johnson.* Louisiana continues to apply an opposing version of the *Batson* analysis notwithstanding the apparent conflict. The Court should grant the writ to clarify this question or summarily reverse and remand the case under *Johnson v. California.*

II. THE COURT SHOULD GRANT THE WRIT TO CORRECT THE FIFTH CIRCUIT AND LOUISIANA'S DEPARTURE FROM THIS COURT'S PRECEDENT ON COMPARATIVE JUROR ANALYSIS

This Court has long recognized "the practical difficulty of ferreting out discrimination" in jury selection which is "discretionary by nature." *Miller-El*, 545 at 238. This case provides the Court with an opportunity to provide clarity to a

[10] It may also have the undesirable result of disincentivising *Batson* challenges. Defendants may delay raising *Batson* challenges lest a negative ruling undermine their ability to prove a prima facie case once the pattern is even more developed. At the same time it will insulate a prosecutor's strikes from challenge whenever an unsuccessful *Batson* challenge has been made.

critical tool for doing so—comparative juror analysis—and the Louisiana Supreme Court's failure to apply this Court's precedent respecting that analysis.

A. The Louisiana Supreme Court and Fifth Circuit's Novel Approach to Comparative Juror Analysis Undermines The Utility of a Critical Tool in Batson's Fight Against Discrimination in Jury Selection

As the Court explained in *Miller-El*, "side-by-side comparisons" of jurors, or comparative juror analysis, is one of the most "powerful" tools for determining whether a prosecutor has engaged in discrimination. "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." 545 U.S, at 241 (finding that plausibility of prosecutor's reasons "[wa]s severely undercut by the prosecution's failure to object to other panel members who expressed views much like [his]").

To be effective, *Miller-El* requires a court to consider only the reasons proffered by the prosecutor at trial. It does not allow a reviewing court to supplement the State's proffered race-neutral reasons. As the Court explained, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.* at 252. "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have shown up as false." *Id.*

In *Miller-El*, the Court rejected post-hoc justifications, whether framed as new reasons for striking black jurors or new explanations for *keeping white* jurors. Relying on comparative juror analysis, the Court found that the prosecutor's proffered reason for striking a black juror—concerns about imposing the death

penalty on someone who could be rehabilitated—was pretextual. It rejected the dissent's attempt to distinguish the otherwise-similar white jurors based upon other characteristics of non-stricken white jurors never raised at trial, including jurors' "strong support for the death penalty" or a white juror's great admiration for law enforcement because her father was an FBI agent. The Court rejected that effort because "the dissent focuses on reasons the prosecution itself did not offer." *See infra*, at 2332." *Id.* at 245 n.4 (citing its "stand or fall" requirement).

In *Miller-El*, the Court also explicitly rejected the argument that a comparative analysis could only be undertaken using jurors who are identical:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Id. at 247, fn.6. Indeed, in *Miller-El,* the Court relied on comparative juror analysis with white jurors who were similarly situated with respect to only one of the two reasons the prosecutor gave at trial. *Id.* at 246, 250 n.8. This makes sense because comparative juror analysis is simply a *tool*, not a definitive test, for determining discriminatory intent, and any differences appropriately go to the strength of the evidence rather than undermining its relevance completely.

Comparative juror analysis has been consistently applied by the Court since *Miller-El*, and played an important role in uncovering discrimination. *See. e.g., Snyder*, 552 U.S. at 485-86 (comparative juror analysis revealed pretext); *Foster v.*

Chatman, 136 S.Ct. 1737, 1751 (2016) (finding "otherwise legitimate reason[s]" for striking prospective black jurors "difficult to credit in light of the State's acceptance of white jurors to whom those reasons also applied"). The Court consistently confines that analysis to reasons the state gave at trial. *See Snyder,* 552 U.S. at 483 (analysis focused on reason concerning scheduling conflict, without discussion of jurors' relative stances on the death penalty); *Foster,* 136 S.Ct. at 1751 (analysis focused on trial prosecutor's reasons that he struck juror because she was divorced and young). The Fifth Circuit has likewise relied on comparative juror analysis to detect discrimination during jury selection, focusing on reasons the trial prosecutor actually gave. *See Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009); *accord Hayes v. Thaler*, 361 F. App'x. 563 (5th Cir. 2010).

In two recent published habeas opinions, however, the Fifth Circuit dispensed with *Miller-El*'s directives as to the proper implementation of this tool. First, in *Chamberlin v. Fisher*, the Fifth Circuit granted rehearing en banc to allow the full court to consider whether a reviewing court could rely on additional characteristics not identified in the race-neutral reasons articulated by the prosecutor to distinguish a white juror accepted by the prosecution from a black prospective juror who it struck. *See Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018). In a deeply divided opinion, Judge Clement wrote for the majority that there is "a crucial difference between asserting a new reason for striking one juror and an explanation for keeping another. . . . If a court does not consider the entire context in which a white juror was accepted, then he/she cannot serve as a useful

comparator." *See id.* at 842. The majority's opinion prompted a strong rebuke from dissenting judges who noted that "[c]omparative juror analysis plays a crucial role in rooting out [] discrimination" which is "largely neutered if an appellate court can come up with 'any rational basis' that distinguishes jurors":

> Today's opinion saps most of the force out of this one tool that has ever resulted in us finding a Batson violation. Despite the only reasons cited at trial for striking two black jurors applying equally to an accepted white juror, the majority rejects the direct conclusion to be drawn from this inconsistency that the proffered reasons could not have been the real reasons for the strikes. If this case in which the compared jurors are identical with respect to the reasons stated at trial is not enough (the standard only requires that they be similarly situated), it is difficult to see how comparative analysis will ever support a finding of discrimination.
>
> What is more troubling is that we have been down this road before [in Miller-El II]. . . . this approach used to avoid the clear import of a direct comparison of the reasons stated at trial is the same rejected analysis of our Miller-El II opinion and the Supreme Court dissent. It is one thing to make a mistake; it is quite another not to learn from it.

Id. at 846 (Costa joined by Stewart, C.J., and Davis, Dennis, and Prado, Circuit Judges dissenting). The cert petition in *Chamberlin*, filed October 4, 2018, is currently pending before this Court. Docket No. (15-70012).

The Fifth Circuit continued its *Chamberlin* approach to comparative juror analysis in *Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018), this time taking it even further. In *Hebert,* the court rejected comparative juror evidence of gender discrimination by distinguishing all the similarly situated males based on factors the prosecutor expressly stated were irrelevant to their reasons.

Soon thereafter, the Louisiana Supreme Court decided Mr. Turner's case, adopting the Fifth Circuit's *Chamberlin/Hebert* approach to comparative juror

analysis to reject his claims of race discrimination. The court did so with little discussion other than a brief citation to *Hebert* and citation to a pre-*Miller-El* precedent of its own. App. A at 28.

It thereby discounted "side-by-side comparisons" with over a dozen white jurors accepted by the State who expressed similar ideas about the relevance of reform, remorse or rehabilitation as black jurors Morgan Weir, Nedra Price and Michael Smith, who the State purportedly struck for those views. The Louisiana Supreme Court did so by scouring the record to find isolated responses to other questions that the *court* thought were more favorable, *see*, *e.g.*, *id.* at 31 (distinguishing Malcolm Jarrell based on his opposition to abolition, and the fact he checked a box: "we are too lenient on criminals"), but which the prosecution never relied upon at trial. Or it distinguished them by divining differences in the way the "similar" views were expressed. It was able to do so despite the fact that the black jurors were patently more favorable for the State than many of those white jurors.

The court's decision validates the dissent's prediction in *Chamberlin* that "comparative juror analysis" will be "largely neutered" whenever "an appellate court can come up with 'any rational basis' that distinguishes jurors," *see Chamberlin*, 885 F.3d at 846, in a case where the black juror's struck were so obviously favorable to the state and the indicia of discrimination is so strong.

The pretextual nature of the state's reasons is confirmed by other evidence. This includes evidence recognized by the Louisiana Supreme Court: the state's mischaracterization of juror's responses, the prosecutor's failure to ask the jurors

anything about the matter they professed concerns about, and reliance upon a reason—emphasis on remorse—that favored the state. *See Snyder*, 552 U.S. at 485 ("implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."). It was further shown by the prosecutor's disparate questioning about juror's experiences of crime, the facts of the inter-racial case, and the pattern, order and disproportionate use of strikes against black jurors.

Yet, the Louisiana Supreme Court swept away the critical evidence of comparative juror analysis that so clearly revealed this pretext by scouring the record for any perceptible differences, and denied the *Batson* claims on the basis of those differences with little regard for any of the other evidence of pretext in the record. If a court can find ways to distinguish the otherwise similarly situated white jurors in this case, it is hard to imagine a case where comparative juror analysis will ever have any teeth.

The Fifth Circuit's *Chamberlin*/*Hebert* restrictive interpretation of *Miller-El,* now adopted by the Louisiana Supreme Court, demands this Court's intervention. Indeed, Judge Costa of the Fifth Circuit, writing for the dissenting judges in *Chamberlin*, specifically requested this Court's "[c]orrection" because the majority opinion "defies precedent." *Chamberlin*, 885 F.3d at 861. This case, which exemplifies so clearly the "neuter[ing]" effect of this novel approach on *Batson*, presents an ideal vehicle to do so. Alternatively, Mr. Turner requests that the Court summarily reverse his case, or, if the Court grants review in *Chamberlin v. Fisher,* Mr. Turner requests that the Court stay his case pending resolution of *Chamberlin.*

D. The Fifth Circuit and Louisiana's Novel Approach--Foreclosed by Miller-El--Conflicts with Practice in the Other Federal Circuits

The novel approach of the Fifth Circuit, now joined by Louisiana, conflicts with all other Circuits. As Judge Costa recognized in his dissent in *Chamberlin*, "no other court applying *Milller-El [ ]* has relied on reasons beyond those given at trial when comparing jurors." *Id.* 885 F.3d at 856. On the contrary, other circuits have rigorously applied the "stand or fall" rule, confining comparisons to the reasons proffered at trial and rejecting efforts by prosecutors (or reviewing courts) to come up with post-hoc reasons to explain away their disparate treatment. *See, e.g., Love v. Cate*, 449 F. App'x 570, 572-73 (9th Cir. 2011); *United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011); *Akins v. Easterling*, 648 F.3d 380, 393 (6th Cir. 2011) (rejecting argument that disparity could be explained by "gut feelings" not expressed by prosecutor at trial); *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1269-70 (11th Cir. 2009) (rejecting supplementation of state's reasons on appeal); *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004); *see also United States v. Charlton*, 600 F.3d 43, 54 (1st Cir. 2010) (conducting comparative juror analysis based only on reasons given at trial); *United States v. Farhane*, 634 F.3d 127, 156-58 (2d Cir. 2011) (same); *Williams v. Beard*, 637 F.3d 195, 218 (3d Cir. 2011) (same); *Golphin v. Branker*, 519 F.3d 168, 180 (4th Cir. 2008) (same);[11] *Drain v. Woods*, 595 F. App'x 558, 577-80 (6th Cir. 2014) (same); *United States v. Morrison*, 594 F.3d

[11] *But see United States v. Dinkins*, 691 F.3d 358, 381 (4th Cir. 2012) (finding white juror was not similarly situated to black juror who was stricken because she had four young children and might have childcare problems based on record evidence that white juror's son was in his twenties, but also noting state's appellate argument that white juror was "married for 25 years to a deputy sheriff" and was "going to be much more favorable" to the government, which court found relevant "as a race-neutral comparative factor distinguishing the two prospective jurors").

626, 633 (8th Cir. 2010) (same); *Grant v. Royal*, 886 F.3d 874, 952 (10th Cir. 2018) (same).

In *United States v. Atkins*, the Sixth Circuit reiterated the meaning of "similarly situated" as it was used in *Miller-El*:

> In conducting a comparative juror analysis, the compared jurors need not be "'similarly situated' in all respects." *Odeneal*, 517 F.3d at 420. In fact, the empaneled white jurors need not even match the stricken black venirepersons in all of the characteristics the prosecution identified in striking the black venirepersons. *Dretke*, 545 U.S. at 247 n.6. It suffices that, after reading the "voir dire testimony in its entirety," we find that the differences identified by the prosecution "seem far from significant."

Atkins, 843 F.3d at 632. The D.C. Circuit has pointed out that it would become "farcical" if a reviewing court were required to conduct a comparative analysis on every possible individual characteristic of various jurors in order to determine whether the jurors were "similarly situated." *United States v. Gooch*, 665 F.3d 1318, 1330-31 (D.C. Cir. 2012) ("The array of issues and comparisons would make a retrospective comparison of jurors based on a cold appellate record farcical.").

Taylor and *Love* are directly on point. In those cases, the Seventh and Ninth Circuits applied *Miller-El's* "stand or fall" rule to reject the government's attempt to proffer new reasons why the prosecutor kept a comparable white juror. In *Taylor*, the Seventh Circuit found it was "clear error under the teaching of *Miller-El* []" for the court to accept "new, unrelated reasons" that non-stricken white jurors had more favorable attitudes toward gun control and mitigating evidence relating to a defendant's background, where "the prosecutor never tried to justify striking [the black juror] based on her views of either issue." 636 F.3d at 905-06.

Likewise, in *Love* the Ninth Circuit refused to consider the State's new reasons for keeping a white juror that the prosecutor did not proffer at trial. *Love,* 449 F. App'x at 572-73. At trial, the prosecutor asserted he struck a black juror because she was a "social worker" and "teachers and social workers don't make good jurors." In habeas proceedings the State tried to explain the failure to strike a white teacher because she had "pro-prosecution aspects of her background that [the stricken juror] lacked." The Ninth Circuit upheld the district court's refusal to consider this factor because the "prosecutor never stated to the trial court" the "non-racial characteristics that distinguished [the white juror] from the black venire member. *Id.* at 572-72 (citing "stand or fall" rule in *Miller-El*, 545 U.S. at 252).

E. This Case Is an Ideal Vehicle To Address This Question Because it is on Direct Appeal and Unencumbered by Any Procedural Issues

This case presents an ideal opportunity for the Court to address this important question of federal law. It is on direct appeal and therefore free from the strictures of habeas review under the AEDPA and has no procedural problems.

III. THE COURT SHOULD GRANT THE WRIT TO SUMMARILY REVERSE IN LIGHT OF LOUISIANA'S UNTENABLY RESTRICTIVE INTERPRETATION OF *BATSON*

The Louisiana Supreme Court's adoption of the most restrictive interpretations of *Batson* at both step one and step three in this case reflect the continued reality that in Louisiana, *Batson* remains an illusory promise.

Under *Batson,* the ultimate burden of proof rests upon the defendant (or moving party) to prove that discrimination motivated a strike. This Court provides the defendant with multiple tools with which to meet that burden: comparative

juror analysis; mischaracterizations of the record; disparate questioning; statistical patterns of strikes; indicia of decimation in strikes of other minority jurors. *See Miller-El,* 545 U.S. 231; *Snyder*, 552 U.S. 472. *Foster*, 136 S. Ct. 1367. Yet, nothing a defendant presents in Louisiana ever seems to be enough. Tellingly, no defendant in Louisiana has been granted relief on a *Batson* claim from the Louisiana Supreme Court by relying upon these tools since *Miller-El* defined them. Most *Batson* reversals have involved cases where the prosecutor's proffered reasons were race-based on their face.[12]

In this step-three *Batson* case, the Louisiana Supreme Court was presented with examples of nearly all of these indicia of discrimination, yet it still denied relief, discounting each by: distinguishing the facts; finding imperfections in proof; or even if acknowledging certain evidence of discriminatory intent, discounting it for failure to demonstrate another. Thus, it discounted disparate questioning because the disparity was not as strong as in *Miller-El;* it discounted comparative juror analysis based on new reasons for distinguishing the non-stricken white jurors; it discounted evidence of pretext demonstrated by the state's mischaracterization of the record and failure to question stricken jurors about the relevant issues, after finding comparative juror analysis deficient.

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[12] *See State v. Coleman*, 2006-0518 (La. 11/02/07), 970 So. 2d 511, 513 (reversing conviction where reasons proffered included that "there is a black defendant in this case. There are white victims"); *State v. Harris*, 2001-0408 (La. 06/21/02) 820 So. 2d 471 (prosecutor stated juror is "the only single black male on the panel with no children"); *State v. Wilkins*, 11-1395 (La.App. 3 Cir. 06/20/12) 94 So. 3d 983 ("the defendant is an African-American"). *See also, State v. Broussard*, 16-1836 (La. 01/30/18), 2018 La. LEXIS 188 (upholding *Batson* reversal where trial court rejected proffered reasons concerning black juror's "low intelligence"). In the only other *Batson* reversal since *Miller-El,* the prosecutor refused to give reasons at all. *State v. Crawford*, 2014-2153 (La. 11/16/16), 218 So. 3d 13 (reversing where trial court conflated *Batson's* three steps and State declined to proffer reasons).

However, perfection in proof or use of all tools is not required. The question is simply whether the defendant has undermined the credibility of the state's purported race-neutral reasons by whatever means and met his burden of proving discriminatory intent. The Louisiana Supreme Court has transformed the *tools* designed to help a defendant meet his heavy burden, into *requirements* that no defendant can meet. In step three cases, a defendant's odds are now no greater than winning a toss using a double sided coin: Heads I win; tails you lose.

This Court's intervention is required to restore *Batson* in Louisiana. The Court should grant this Writ to address this enduring problem, or summarily reverse and remand the case under *Johnson v. California,* and *Miller-El v. Dretke.*

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the petition to review the Louisiana Supreme Court's decision, grant the petition and summarily reverse, or, should the Court grant review in C*hamberlin v. Fisher,* stay his case pending the resolution of *Chamberlin.*

Respectfully submitted

/s/ Caroline W. Tillman
CAROLINE W. TILLMAN
**Counsel of Record*
SHANITA FARRIS
Capital Appeals Project
1024 Elysian Fields Ave.
New Orleans, LA 70117
Telephone: 504.529.5955;
Email: ctillman@defendla.org