

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

No. 18-9710

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

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioner, Lee Turner, Jr., files this Supplemental Brief, under Supreme Court Rule 15(8) in light of the Court’s decision in *Flowers v. Mississippi*, issued on June 21, 2019. *Flowers v. Mississippi*, No. 17-9572, 2019 U.S. LEXIS 4196 (2019).

In *Flowers*, the Court continued its efforts to “vigorously enforce[] and reinforce[]” *Batson*’s mandate and “guard[] against any backsliding.” *Id.*, at *28. When reversing Mr. Flowers’ conviction, the Court relied on many key indicia of discrimination and pretext identified in its precedents that are also present in Mr. Turner’s case: the prosecution’s racially disproportionate exercise of strikes; misrepresentation of jurors’ responses; disparate questioning of black and white jurors in ways designed to create bases for challenges; failure to question jurors about the issues of purported concern; and comparative juror analysis. In doing so, the Court confirmed the proper assessment of such evidence in ways that directly implicate all three questions presented by Mr. Turner in his Petition.

Flowers confirms that Louisiana’s adherence to the minority Circuit Court approaches to two critical aspects of *Batson*—assessment of statistical evidence in the step-one enquiry, and conduct of comparative juror analysis at step three—is inconsistent with federal law. It further demonstrates that the Louisiana Supreme Court’s decision finding no error in the trial court’s denial Mr. Turner’s *Batson* challenges is so at odds with this Court’s *Batson* precedents, that granting certiorari, if not summary reversal, is appropriate. Given Louisiana’s continued application of

standards that conflict with this Court's precedents, *Batson's* enforcement requires this Court's direct intervention.

I. The Court's decision in *Flowers* confirms that Petitioner's First Question Presented Should be Answered in the Affirmative: "Mere Statistics" Are Sufficient To Raise A *Prima Facie* Case of Discrimination under *Batson*.

The first question presented in the Petition is:

1. *Whether "mere statistics" are sufficient to demonstrate a prima facie case of discrimination under Batson v. Kentucky, 476 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.*

In *Flowers*, this Court reiterated its holding in *Batson*, that "a pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination" sufficient to support a *prima facie* case under step one of *Batson*. *Flowers*, 2019 U.S. LEXIS at *37. (citing *Batson*, 476 U.S. at 97) (quotations omitted). In *Flowers*, the prosecutor used 5 of 6 strikes to remove African Americans from Mr. Flowers' jury. *See id.*, at *34, *37-38. These statistics propelled Mr. Flowers' claim to step two of the *Batson's* analysis. The Court then relied on those statistics as one of four categories of evidence of discriminatory intent to find that Mr. Flowers met the far higher burden at step three of *Batson* of actually proving that race substantially motivated the prosecutor's strike of African-American juror, Carol Wright. *See Flowers*, 2019 U.S. LEXIS 4196 (2019).

In doing so, *Flowers* confirms the impropriety of Louisiana's categorical rule that a prosecutor's pattern of strikes against African Americans, however stark, does not raise even the "mere inference" of discrimination sufficient to found a *prima facie* case. *See*, App. A at 37 (applying its categorical rule in Mr. Turner's case to find no

inference of discrimination where prosecutor used 6 of 7 strikes to remove African Americans).

In *Flowers*, this Court also rejected any notion that a prosecutor's disproportionate pattern of strikes against African Americans can only be relied upon as evidence of discriminatory intent if all of those strikes are proven to be discriminatory. To be sure, this was the position pressed by the dissent. *Id.*, at *68 (Thomas, J., dissenting) ("the majority illegitimately counted [the prosecutor's strikes of other African Americans] against the State" despite the fact they were found to be "race-neutral"). This is the same reasoning the Louisiana Supreme Court relied upon to discount any consideration of the prosecutor's disproportionate use of strikes against African Americans in Mr. Turner's case, and *Flowers* confirms it was erroneous.

Thus, *Flowers* provides a further reason for this Court to grant certiorari and summarily reverse Mr. Turner's case, or at the very least grant certiorari to clarify the proper analysis of statistical evidence at step one of *Batson*.

II. The Court's Decision in *Flowers* confirms that Petitioner's Second Question Should be Answered in the Affirmative: For the Purposes of Comparative Juror Analysis, the Prosecutor Must Stand or Fall Solely Upon the Reasons He Gave at Trial

The second question raised in the Petition was:

2. *Whether a court reviewing comparative juror analysis presented to demonstrate purposeful discrimination 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.*

In *Flowers*, the Court demonstrated through its own conduct of comparative juror analysis that the answer to this question is: no. After emphasizing the importance of comparative juror analysis to the *Batson* enquiry, *id.*, at *44-45, the Court conducted that analysis with sole reference to the characteristics of the stricken black juror cited by the prosecutor at trial. *See id.*, at *45-48. Over the objection of the minority dissent, it did not take into account characteristics of non-stricken white jurors that were not mentioned by the prosecutor at trial but that could have made them appear more favorable to the prosecutor. *Cf id.*, at *70-72 (Thomas J., dissenting) (objecting that white jurors were not comparable in light of factors that made them more favorable, including, e.g., their close relationships with members of the victim's family). Neither did the majority require that comparator white jurors be "identical" in every respect. *Id.*, at *45 ("a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent"). Thus, the Court found the State's race-neutral reason that the black juror worked with the defendant's father and knew several defense witnesses was pretextual after comparing the black juror to white jurors the State did not strike, including white jurors whose knowledge of and relationships to defense witnesses were more limited. *Id.*, at *69-72.

The Court's decision in *Flowers* confirms the impropriety of the Louisiana Supreme Court and Fifth Circuit's approach to comparative juror analysis, which allows a prosecutor to avoid the proper inference to be drawn from racially disparate treatment of jurors, if they can identify any discernible distinction between the black

and white jurors in the record on appeal. *Flowers* thus provides a further reason why the Louisiana Supreme Court's decision should be summarily reversed. At the very least, it confirms that certiorari should be granted to emphasize that the "stand or fall" rule of *Miller-El* encompasses reasons for keeping white jurors as well as reasons for striking black jurors, and that jurors do not have to be identical for comparative juror analysis to provide evidence of discriminatory intent. See *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

III. The Court's decision in *Flowers* confirms that Petitioner's Third Question Should be Answered in the Affirmative: Petitioner Demonstrated Purposeful Discrimination Requiring Appellate Relief Under *Batson*

The third question presented was:

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.*

In *Flowers*, the Court catalogued the key tools identified in its precedents for demonstrating racial discrimination, and confirmed the significance of many of the types of evidence of discrimination and pretext that are present in Mr. Turner's case. See generally, *Flowers*, 2019 U.S. LEXIS, at *29-30. The Court's elaboration of the significance of the prosecutor's pattern of strikes against African Americans and of comparative juror analysis is noted above. In addition, the Court emphasized the significance of disparate questioning by a prosecutor of black jurors about certain

topics in an effort to generate “seemingly race-neutral reasons to strike the prospective jurors of a particular race.” *Id.*, at *42. As the Court explained, “by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently.” *Id.* That very practice was evident in Mr. Turner’s case, as the prosecutor questioned black jurors more intensely than white jurors about the potentially biasing factor of their personal experiences as crime victims.

The Court highlighted that the prosecutor’s reliance on race-based reasons that are contradicted by the record can be evidence of pretext, especially where there is an extended “*pattern* of factually inaccurate statements about black prospective jurors,” *Id.*, at *49 (emphasis added), which was true in Mr. Turner’s case, as in *Flowers*.

The Court also reiterated its recognition that a prosecutor’s failure to question jurors on a subject the State alleges it is concerned about “is evidence suggesting that the explanation is a sham and a pretext for discrimination.” *Id.*, at *46 (quotations and citations omitted). That occurred repeatedly in Mr. Turner’s case, as none of the black jurors whom the State claimed it struck because of questionnaire responses emphasizing the relevance of redemption, remorse or reform at sentencing, were ever questioned about those responses.

Thus, *Flowers* confirms the strength of the evidence of discrimination presented by Mr. Turner to the courts. For this reason too, *Flowers* supports the petition for certiorari. It provides clear further basis for summary reversal of the

Louisiana Supreme Court's determination that Mr. Turner "fail[ed] to show error in the trial court's denial of his *Batson* challenges . . ." App. A. at 27.

The evidence of discriminatory intent in the State's strike of Michael Smith in Mr. Turner's case, is at least as great as for the excluded black juror, Carol Wright, in *Flowers*. Like Ms. Wright, Mr. Smith strongly favored the death penalty; in fact, he testified that he was an armed robbery victim and would "probably" vote for death on the facts of the case involving an armed robbery murder. The State failed to ask Mr. Smith about the *only* purported race-neutral concern it came up with, (an isolated response on his questionnaire) and did not ask any of the other jurors about that topic either. When that reason was challenged by defense, the State supplemented it with an implausible reason (Smith's emphasis on remorse at sentencing), which actually favored the State at trial. The State failed to strike a dozen white jurors who gave similar responses as Mr. Smith, compared to the three comparable jurors not stricken in *Flowers*. At both trials, the prosecutor disproportionately struck African Americans. The State questioned Mr. Turner's jurors disparately based on race, including Mr. Smith. (Ms. Wright was not subject to the disparate questioning identified in *Flowers*.) And in both cases, the prosecutor mischaracterized the responses of multiple black jurors as it attempted to justify its disproportionate removal of them to the court.

Yet the Louisiana Supreme Court discounted this abundant evidence relying on its restrictive interpretations of *Batson*: it disregarded the State's disproportionate removal of black jurors because it found those strikes were race neutral; and it

disregarded comparative juror analysis based on distinctions between the black and white jurors that the trial prosecutor never made. It discounted the remainder of the evidence by imposing arbitrary standards (e.g., disparate questioning not as pronounced as *Miller-El*), or by ignoring it altogether.

For all the reasons discussed, Mr. Turner respectfully requests that the Court grant his writ of certiorari, vacate the Louisiana Supreme Court's decision, and remand for further proceedings under *Flowers*. In the alternative, he requests that the Court grant his petition and address the questions presented to ensure the proper enforcement of *Batson* in Louisiana in accordance with the Court's precedents in *Batson*, *Johnson*, *Miller-El*, and now *Flowers*.

Respectfully submitted

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