No. 18-9710

IN THE
Supreme Court of the United States

LEE TURNER, JR., *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent.*

On Petition for Writ of Certiorari to the Louisiana Supreme Court

AMICUS BRIEF OF THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (LACDL) AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), BATON ROUGE BRANCH IN SUPPORT OF PETITIONER

**** CAPITAL CASE ****

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STATEMENT OF INTEREST OF *AMICI*[1]

The Louisiana Association of Criminal Defense Lawyers ("LACDL") is a non-profit professional association of counsel devoted to promoting excellence in the practice of criminal law and protecting and defending the rights of the accused. LACDL was formed in 1985, and it is the state's first and largest professional association of counsel devoted exclusively to criminal defense. It counts among its members private criminal defense lawyers, public defenders, law professors, and judges. LACDL works with and on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. The organization is dedicated to assisting the courts, legislature, and law enforcement agencies in accomplishing their legitimate functions consistent with the rule of law and the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL files numerous *amicus* briefs each year, seeking to provide the courts with the perspective of the organization in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. LACDL has previously filed amicus briefs in this Court in other cases addressing jury discrimination. *See*, *e.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Dressner v. Louisiana*, 562 U.S. 1271 (2011), cert. denied; *Hebert v. Rogers*, 139 S.Ct. 1290 (2019), cert. denied.

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[1] Pursuant to this Court's Rule 37, *Amici* state that no counsel for any party authored this brief in whole or in part or made a monetary contribution toward this brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

The Baton Rouge Branch of the National Association for the Advancement of Colored People ("NAACP") is composed of between 4,500-5,000 financial members, and its members are residents of East Baton Rouge Parish, Louisiana. *Amicus* submits this brief on its own behalf and on behalf of the members of the local NAACP chapter. The chapter and its members are politically, socially, and civilly active within the East Baton Rouge community—they vote, organize for social change, and are invested in the State's interaction with the community. *Amicus* and members of its community have voted in the elections of District Attorneys and judges, have been complainants, witnesses, plaintiffs, civil and criminal defendants, and citizens reporting for jury service. The members of this chapter have long been concerned that the East Baton Rouge Parish criminal justice system does not afford African-American citizens fair and equal treatment under the United State Constitution.

Together, *Amici* have a significant interest in ensuring that prosecutors conduct jury selection in an evenhanded manner and without discrimination against African Americans, especially in capital cases. *Amici* submit the instant brief in order to provide this Court with the statistical, anecdotal, jurisprudential, and legislative evidence of the unfortunate history of discrimination against African Americans in Louisiana and in East Baton Rouge Parish in particular.

SUMMARY OF THE ARGUMENT

Mr. Turner's petition for certiorari does not come to this Court in a vacuum. East Baton Rouge Parish is a jurisdiction with a well-documented history of

racial discrimination against African Americans in jury selection. A generation ago, East Baton Rouge prosecutors openly confessed that they intentionally excluded prospective African-American jurors from criminal trials. The truth of those prosecutorial confessions echoes today, and Mr. Turner presented compelling evidence supporting the claim that the prosecution discriminated against Black jurors during jury selection in his capital murder trial. Nevertheless, consistent with the state judiciary's stifling interpretation of *Batson* and the legislature's acts undermining it, the Louisiana Supreme Court discounted that evidence and concluded the State's peremptory strikes did not violate the Equal Protection Clause. This brief presents critical context to Mr. Turner's claim. It locates the claim within broader, simmering racial tensions in the Baton Rouge community and identifies the state-level policies and decisions that have worked to render *Batson* toothless in Louisiana in all but the most blatant instances of purposeful discrimination. *Batson* means more. This case presents the Court with an opportunity to make sure it is properly implemented in Louisiana.

ARGUMENT

I. EAST BATON ROUGE PARISH HAS A LONG AND TROUBLING HISTORY OF RACIAL DISCRIMINATION AGAINST BLACK CITIZENS

A. The East Baton Rouge Parish District Attorney's Pursuit of the Death Penalty Has Been Inextricably Tied to Race

An academic study done of the East Baton Rouge Parish capital sentencing outcomes indicate that the death penalty there is inextricably tied to race. The study reviewed 191 homicide crimes between 1990 and 2008 that, at some point, involved a first-degree murder charge. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647, 670 (2011). The results are striking. The researchers identified a statistically significant race-of-the-victim effect: the odds of a death sentence were 97% higher for White-victim cases. *See id.* at 670-71. Individuals convicted of killing White victims were 2.6 times more likely to be sentenced to death. *See id.* at 660. Although there was no statistically significant race-of-the-defendant effect, the fact remained that at the time of the study all 16 men on Louisiana's death row who were convicted in East Baton Rouge Parish were African-American. *Id.* at 650. Where these kinds of racial disparities are manifest, it is not surprising that prosecutorial race discrimination in jury selection has also been documented in East Baton Rouge Parish.

B. The East Baton Rouge Parish District Attorney's Office Admitted that it Purposely Discriminated Against Prospective African-American Jurors Before this Court Decided *Batson*

Before this Court decided *Batson*, defendants challenging the prosecution's use of peremptory strikes under the Equal Protection Clause encountered a difficult burden fixed by *Swain v. Alabama*, 380 U.S. 202 (1965). This Court ultimately described that burden as so "crippling" that "prosecutors' peremptory challenges [we]re now largely immune from constitutional scrutiny." *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986). Yet, even under the *Swain* regime, East Baton Rouge prosecutors managed to have several of their convictions reversed. On multiple occasions, prosecutors from the office testified that they struck African-American jurors because of their race.

Consider Ralph Roy, who served as a prosecutor in the office for nearly three decades before he passed away in 1984. When it overturned one of the convictions he won in 1979, the Louisiana Supreme Court wrote:

> In explaining why he used his peremptory challenges so much proportionately [sic] against blacks, he stated: "I have found through experience, some twenty-three years in the District Attorney's office, that blacks, where you have a black defendant, will generally vote not guilty, in spite of the strength of the state's case . . . I find, not without justification, particularly

> young blacks, they are very resentful of the white establishment."

State v. Washington, 375 So. 2d 1162, 1163 (La. 1979).[2] The case—like Petitioner's—involved the "prosecution[] of [a] black[] [defendant] where a white victim was involved." *Id.* Despite the prosecutor's confession of a deliberate intent to exclude African-American jurors, the Louisiana Supreme Court only narrowly voted to reverse in a 4-to-3 decision. One of the dissenting justices even lamented the outcome, calling Roy "one of the most capable criminal trial tacticians in this state" and declaring "[i]f anything is wrong, it is the system, not the prosecutor." *Id.* at 1165 (Blanche, J., dissenting).

Other prosecutors in the same office admitted that they adopted the same approach to jury selection. Anthony Marabella, who later had a private practice with current East Baton Rouge District Attorney Hillar Moore III[3] and then was elected judge, worked as an Assistant District Attorney early in his career.

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[2] Ralph Roy was not personally named in the text of the *Washington* opinion, but the majority opinion referred to other cases which make clear that Roy was the prosecutor who testified. *See Washington*, 375 So. 2d at 1162–63; *State v. Brown*, 371 So. 2d 751, 752 (La. 1979) (noting "the assistant district attorney, Mr. Ralph Roy, employed only five peremptory challenges, all against blacks, thereby securing the all white jury which tried this case").

[3] Roy, Marabella, and Moore all worked for former East Baton Rouge District Attorney Ossie Brown. Moore was an investigator in the office in the early 80's. When Brown died in 2008, Moore told the press that Brown "stood for certain principles and took positions that were always firm. He was always for the victims of crime." Steven Ward, *Former DA Ossie Brown dies at 82*, THE BATON ROUGE ADVOCATE, Aug. 29, 2008 (2008 WLNR 16370415) (adding that Brown "adopted me as a son").

In a *Swain* case, he testified that the DA's office did not have a "stated policy" of striking African-American jurors, but that "his practice as an assistant district attorney from 1973 until 1976 was to exclude blacks from jury panels by the use of peremptory challenges." *State v. Wagster*, 489 So. 2d 1299, 1304 (La. Ct. App. 1986), *writ denied*, 493 So. 2d 1218 (La. 1986); *see also State v. Brown, supra* note 2, at 753 (reversing conviction under *Swain*, citing eleven other cases involving similar allegations, and lamenting the failure of East Baton Rouge prosecutors to heed the court's prior warnings).[4]

The ongoing problem of race discrimination by East Baton Rouge prosecutors during jury selection was also noted by Justice Dennis in *State v. Eames*. In that case, a prosecutor gave a similar justification for striking Black jurors: "the prosecuting attorney candidly admitted that he had not wanted blacks on the jury in the instant case and indicated that he had excluded them because he believed that any black juror would have been susceptible to intimidation by black radicals in the community." *State v. Eames*, 365 So. 2d 1361, 1365 (La. 1978) (Dennis, J., concurring).

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[4] According to multiple sources, "FBI documents reveal that confidential sources reported [East Baton Rouge DA] Ossie Brown . . . was 'closely associated' with the Ku Klux Klan in Baton Rouge and attended a KKK meeting as a robed speaker." Confession or Coercion?, MEDILL JUSTICE PROJECT (2014), http://www.medilljusticeproject.org/2014/12/08/confession-or-coercion/ (last visited Jul 10, 2019); *see also* Annie Ourso & Julie Hebert, *Kenny "Zulu" Whitmore says 1977 trial for killing of ex-Zachary mayor was unfair*, THE BATON ROUGE ADVOCATE, May 11, 2015, *available at* https://www.theadvocate.com/baton_rouge/news/crime_police/article_a7a0fa42-bb8c-5fdb-a5cc-bbedadf7e319.html (describing the FBI's information in more depth).

The Louisiana Supreme Court reversed the defendant's conviction on other grounds. In his concurrence, Justice Dennis took the opportunity to identify the recurring problem in East Baton Rouge, as well as *Swain*'s failure to rectify that problem. "Although this Court in the past has followed *Swain*, recent opinions have expressed concern over the continuing claims of racial exclusion in the selection of East Baton Rouge Parish juries. The instant appeal indicates that past warnings against an obsolete prosecutorial attitude have gone unheeded." *Id.* at 1368.

Given this history, it is also not surprising that the first Louisiana Supreme Court reversal under *Batson* likewise came out of East Baton Rouge Parish. *See State v. Collier*, 553 So. 2d 815, 818 (La. 1989). The *Batson* claim in *Collier* bears a strong resemblance to the one Petitioner presents. The State in *Collier* used eight peremptory strikes in total; all eight were exercised against prospective African-American jurors. *See id.* at 817. While two African Americans served, the court held that the pattern of State strikes proved sufficient to establish a *prima facie* case of discrimination. *See id.* at 819-20 The court ultimately found the State's explanations to be pretextual, largely because its claim that it struck two Black jurors because of questionnaire responses indicating they were Baptist did not similarly move the prosecution to strike several White Baptist jurors. *See id.* at 822. The court also found significance in the State's failure to "even inquire" into the religious affiliation of any jurors. *Id.* In reversing, the court presciently observed: "[i]f trial courts were required to find satisfactory any reason given by the prosecutor not based on race, only prosecutors who admitted

point blank that they excluded veniremen because of their race would be found in violation of the Fourteenth Amendment's guarantee of equal protection." *Id.* at 821.

Collier, unfortunately, represents a high point in Louisiana's enforcement of *Batson* in East Baton Rouge Parish. Since *Collier*, and despite this Court's guidance in cases like *Miller-El v. Cockrell*, 537 U.S. 322 (2003) [hereinafter *Miller-El I*], *Miller-El v. Dretke*, 545 U.S. 231 (2005) [hereinafter *Miller-El II*], and *Snyder v. Louisiana*, 552 U.S. 472 (2008), not a single defendant has won a *Batson* claim on appeal out of East Baton Rouge Parish.

C. Racial Tensions Have Run High in Baton Rouge for Many Years

State discrimination against African Americans played a large role in how Baton Rouge responded to the massive dislocation and resettlement of individuals who lost their homes during Hurricane Katrina in 2005. Fearful of the many African Americans from New Orleans who fled to Baton Rouge, officers demonstrated antagonism. Even law enforcement officers from other states who came to support the hurricane relief effort reported that the Baton Rouge police used excessive force against Black people, including minors, through the use of tasing, hitting, choking, and pepper-spraying without warning or threat to the safety of officers or civilians. They also indicated that local law enforcement conducted searches of Black individuals and their vehicles without reasonable suspicion or probable cause and may have falsified information against African Americans in their police reports. *See, e.g.*, Dan Frosch, *Cop Out*, GAMBIT, Nov. 14, 2005,

available at https://www.theadvocate.com/gambit/new_orleans/news/article_2ac275c0-37e1-500a-96b6-64ecea9bf464.html ("What happened so upset the New Mexico officers that the entire team pulled out of joint patrol operations in Baton Rouge after just two days."). As one report put it, the police were out to "make life rough for New Orleans evacuees so they would leave town." A.C. Thompson, *In Baton Rouge, More Allegations of Police Misconduct After Hurricane Katrina*, PROPUBLICA, Mar. 15, 2010, *available at* https://www.propublica.org/article/in-baton-rouge-more-allegations-of-police-misconduct-after-hurricane-katrin. "One trooper said Baton Rouge officers referred to black people as animals that needed to be beaten down." Kimberly Vetter, *Post-Katrina reports detail alleged police misconduct*, THE BATON ROUGE ADVOCATE, Mar. 14, 2010, 2010 WLNR 5413328.

Both the perception of police conduct and the plight of Katrina evacuees were highly relevant at Petitioner's trial. Petitioner, Mr. Turner, is African American and left New Orleans for Baton Rouge when Hurricane Katrina struck. Mr. Turner's statement to police came after police subjected him to a grueling 11-hour interrogation, which included officers misrepresenting evidence and repeating threats of capital punishment—even warning Petitioner that "you're a black man facing the death penalty." As for the penalty phase, Mr. Turner's evacuation, displacement, and resilience in the face of Hurricane Katrina formed a central theme in mitigation.

The Baton Rouge Police Department's troubling response to the influx of African-American citizens from New Orleans surfaced serious doubts about the legitimacy of their tactics and goals, and those doubts

persist, as Baton Rouge police have been at the center of a number of well-publicized allegations of misconduct and brutality. In September 2014, for instance, a series of racist text messages sent by a Baton Rouge Police Department officer to a civilian were disclosed to the public. In the messages, the officer, a 15-year veteran of the department, referred both to Black colleagues and civilians with racial epithets, and stated, among other things, "I wish someone would pull a Ferguson on them and take them out. I hate looking at those African monkeys at work . . . I enjoy arresting those thugs with their saggy pants." Daniel Bethencourt, *Baton Rouge cop resigns, accused of sending racially charged texts*, THE BATON ROUGE ADVOCATE, Sept. 5, 2014, *available at* https://www.theadvocate.com/baton_rouge/news/article_d0199f31-8256-5acb-adf1-81cfac494e92.html.

In 2016, the police killing of an African-American man, Alton Sterling, garnered national attention and prompted protests by the community and calls for accountability. Upon first arriving at the scene, one of the two White officers reportedly put a gun to Sterling's head and said "I'll kill you, bitch." The officer gave Sterling a "stern" warning: "Don't fucking move or I'll shoot you in your fucking head." Report, LOUISIANA DEPARTMENT OF JUSTICE, Mar. 27, 2018, at 7, *available at* https://www.scribd.com/document/374961825/Louisiana-DOJ-report-on-Alton-Sterling-shooting#download&from_embed. Sterling was shot and killed at close range while being restrained. Sterling's death was the final straw because, as Baton Rouge's African-American community already knew, it was not "an isolated incident." Jarvis DeBerry, *Before Alton Sterling Killing, Baton Rouge Police had a history of brutality*

complaints, NEW ORLEANS TIMES-PICAYUNE, July 6, 2016, *available at* https://www.nola.com/crime/2016/07/baton_rouge_police_brutality.html. No charges were filed against the officers, and the officer who shot Sterling has appealed his firing from the police department.

The persistent problems with local policing not only affected the citizens being policed; it was also far more difficult for Black officers to be hired on to the force. In 1980, the City of Baton Rouge was brought under a consent decree with the Department of Justice intended to remedy racially discriminatory hiring practices. A judge only lifted the decree for the city in June of this year, nearly four decades after it was first handed down. *See* Terry L. Jones, *After 39 years, Baton Rouge released from federal consent decree on racial, gender hiring disparities*, THE BATON ROUGE ADVOCATE, June 4, 2019, *available at* https://www.theadvocate.com/baton_rouge/news/crime_police/article_d014e42e-8704-11e9-a75e-dbb2d8387744.html.

The racial rift in Baton Rouge does not end with the police department. At the time of Mr. Turner's trial, some community members in the southeastern portion of East Baton Rouge Parish began a petition to establish a separate educational system, and then a city, called St. George, which was disproportionately White and reminiscent of segregation. *See, e.g.*, Adam Harris, *The New Secession*, THE ATLANTIC, May 20, 2019, *available at* https://www.theatlantic.com/education/archive/2019/05/resegregation-baton-rouge-public-schools/589381/ ("The proposed area is more than 70 percent white and less than 15 percent black, while East Baton Rouge Parish is

roughly 46.5 percent black. St. George supporters decry the violence and poor conditions of the public schools in Baton Rouge."). This racially-polarized issue was particularly salient at the precise time of Petitioner's trial: the 60-day window to make up the shortfall in petition signatures coincided exactly with Petitioner's trial. *See* Jack Barlow, *The St. George Movement in Baton Rouge: an education revolution, or white flight?*, THE GUARDIAN, Apr. 8, 2015, *available at* https://www.theguardian.com/us-news/2015/apr/08/st-george-movement-baton-rouge-louisiana-schools.

Jury selection in this very case evinced the racial divide in the parish. Over 66% of prospective White jurors expressed the view that Black people are more violent and commit more crimes, compared to only 20% of prospective Black jurors. All eight minority jurors the State struck had disavowed these particular views. One prospective White juror summarized succinctly the basis for her view that African Americans commit more crimes: "news, tv, prisons and just the facts." Another White prospective juror fairly cautioned the parties that he may not be impartial because "my upbringing has made me somewhat insensitive to many A[frican] A[merican]s."

II. THE RECENT EXPOSURE OF THE JURISDICTION'S EXTENDED AND SYSTEMATIC EXCLUSION OF ELIGIBLE PROSPECTIVE JURORS HEIGHTENS THE NEED FOR JUDICIAL SUPERVISION

In April of this year, during jury selection in the capital prosecution of a defendant named Grover Cannon, lawyers took note that although individuals

become eligible to serve on a jury at the age of 18, "not a single person in the group of 566 men and women [in the East Baton Rouge Parish jury pool] was under 26." John Simerman, *'I'm kind of baffled': Analysis shows young people excluded from Baton Rouge jury pools*, THE BATON ROUGE ADVOCATE, April 2, 2019, *available at*: https://www.theadvocate.com/baton_rouge/news/courts/article_0b97a25a-558e-11e9-a75e-c3fed9516875.html. Counsel in that case conducted a "review of jury data from 2017 and the first half of 2018" which "showed that none of the 65,000 people who were sent jury summonses in East Baton Rouge Parish during that time was born after June 1993." *Id.* The revelations eventually persuaded the Louisiana Supreme Court to quash the venire. *See State v. Cannon*, 2019-0590 (La. 04/18/19), 267 So. 3d 585, 585–86 ("Defendant has shown that, under the system employed in East Baton Rouge Parish, persons born after June 2, 1993, otherwise qualified to serve on the jury, were never given an opportunity to serve, because their names were excluded from the general venire as a result of a significant error in the process by which the general venire was composed.").

Mr. Turner's 2015 venire was tainted by the same flaw as Mr. Cannon's, as it was selected from a wheel that had not been updated since 2011. No one under the age of twenty-three was even issued a summons. Even in the face of an already-skewed pool, the State explained its peremptory strike against Hispanic juror Savannah Jule by complaining that she was "extremely" young. *State v. Turner*, 2016-1841 (La. 12/5/18), 263 So. 3d 337. App. A. at 33. Ms. Jule was 25 years old.

Although the total exclusion of youthful prospective jurors is legally distinct from the State's purposeful discrimination against Black jurors in Mr. Turner's case, both threaten the same principle of our democratic system. *Cf. Flowers v. Mississippi*, No. 17-9572, 2019 WL 2552489, at *6 (U.S. June 21, 2019) (noting that the normal jury selection process begins when "a group of citizens in the community is *randomly* summoned to the courthouse on a particular day for potential jury service") (emphasis added). This Court explained that beautifully in a case that emerged out of Louisiana:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Taylor v. Louisiana, 419 U.S. 522, 530 (1975). Not only did the prosecution disproportionately strike prospective African-American jurors at Mr. Turner's capital trial, but the State also failed to summon anybody in the defendant's age range, which is all the more reason this Court should grant certiorari.

III. THE LOUISIANA COURTS AND LEGISLATURE HAVE ENABLED RACE DISCRIMINATION IN JURY SELECTION TO GO UNCHECKED BY ADOPTING RULES AND LAWS THAT UNDERCUT *BATSON*

The petition for certiorari not only emerges in the context of a deep-seated history of racial discrimination in Baton Rouge, but also within a legal universe in which *Batson*'s protections have been devalued by the state judiciary and legislature.

A. This Court's Intervention in *Snyder v. Louisiana* Responded to the State Judiciary's Unwillingness to Apply *Batson* Appropriately

After deciding *Miller-El II*, this Court granted Allen Snyder's petitioner for certiorari, vacated the decision below, and remanded the case to the Louisiana Supreme Court for reconsideration. *See Snyder v. Louisiana*, 545 U.S. 1137 (2005). The state court's vacated opinion had rejected the defendant's *Batson* challenge, and failed altogether to identify the State's pretextual reasons for excluding at least one of the five prospective African-American jurors it struck while securing an all-White jury. *See generally State v. Snyder*, 750 So.2d 832 (La. 1999). Only two dissenting justices suggested that the prosecution's actions at trial provided evidence of pretext. *See id.* at 866 (Johnson, J., dissenting); *see id.* at 864 (Lemmon, J., concurring in part and dissenting in part).

On remand, a majority of the Louisiana Supreme Court failed to account for the relevant evidence of discrimination once again. *See State v. Snyder*, 1998-1078 (La. 9/06/06), 942 So. 2d 484, 499, *rev'd*, 552 U.S.

472 (2008). The dissenting justices, however, recognized the tools available to expose the State's justifications as pretextual. *See, e.g.*, *id.* at 507 (Johnson, J., dissenting) ("The difficulty for trial courts has always been separating out reasons that are legitimate, from those that are merely pre-textual. *Miller-El* suggests some tools to use in determining whether the proffered race neutral reasons are pre-textual."). Of course, this Court granted certiorari once again and reversed. *See Snyder*, 552 U.S. at 472. Using *Miller-El II* comparisons between an excluded African-American juror and White jurors the prosecution did not strike, the Court found a *Batson* violation. *See id.* at 483-84.[5]

B. Louisiana Has Adopted Numerous Doctrines and Laws that Render *Batson* Ineffective

The *Snyder* back-and-forth between this Court and the Louisiana Supreme Court is only one illustration of the many ways in which the state courts and legislature have undercut *Batson*.

In cases in which any member of the final jury is a racial minority, courts in Louisiana rely heavily on that fact as a basis for denying *Batson* relief. The fact is framed as a consideration rather than dispositive, but it often proves decisive. In Mr. Turner's case, in which two seated jurors were Black and one was Hispanic, the Louisiana Supreme Court deployed its typical analysis: "Notably, while the presence of one minority juror on the panel does not alone defeat a *Batson* challenge, it remains a relevant circumstance

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[5] *See also* Brief of Amicus Curiae Louisiana Association of Criminal Defense Lawyers, *Snyder v. Louisiana,* 2007 WL 1495832 (U.S.), 1-2.

for the court to consider in assessing the prosecutor's overall intent." *Turner*, 263 So. 3d at 375. The pivotal weight that Louisiana courts give to the presence of a minority on the jury is difficult to square with this Court's observation that "[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). "In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers*, 2019 WL 2552489, at *9.

The "presence" doctrine has interacted perniciously with other Louisiana irregularities. Take, for example, the State's law providing for non-unanimous jury verdicts. *See* La. C.Cr.P. art. 782(A) (West 2018) ("Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."). Unlike non-capital cases, capital cases have long required unanimity. *See id.* ("Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict.").[6] Drawing on the

[6] On November 6, 2018, Louisiana's citizens adopted a constitutional amendment supported by *Amici* to require that all jury verdicts be handed down by unanimous juries. This amendment went into effect for prosecutions of offenses alleged to have occurred on or after January 1, 2019. *See* Kevin McGill & Rebecca Santana, *Louisiana Votes to End Non-Unanimous Jury Verdicts*, U.S. NEWS, Nov. 6, 2018, *available at*: https://www.usnews.com/news/best-states/louisiana/articles/2018-11-06/louisiana-decides-future-of-non-unanimous-jury-verdicts.

racially-motivated non-unanimity provision,[7] the Louisiana Supreme Court has held that the presence of a minority juror on a capital jury provides stronger evidence that the prosecution did not intentionally discriminate because capital cases require unanimity. *See*, *e.g.*, *State v. Tart*, 93-0772 (La. 02/09/96), 672 So.2d 116, 141 ("Although the mere presence of African–American jurors does not necessarily defeat a *Batson* claim, the unanimity requirement of a capital case sentencing recommendation may be considered."). This caselaw artificially raises the burden of persuasion on capital defendants, further, and enables prosecutors to more breezily defeat a *Batson* claim by strategically permitting at least one member of a racial minority on the jury. *See also State v. Juniors*, 03-2425 (La. 06/29/2005), 915 So. 2d 291, 320 ("the fact that the State accepted three African–Americans who eventually served on the jury provides added support for the trial court's conclusion that race was not the motivating factor behind the State's peremptory challenges.").

As a result of this "presence" doctrine, in Louisiana jurisdictions with racially diverse populations—like East Baton Rouge Parish (approximately 48% White and 47% Black today)—it is difficult for defendants to prevail on *Batson* claims. The demographics ensure that at least some minority jurors will serve, and this fact is often used to defeat *Batson* challenges in the trial court. *Cf. Flowers*, 2019 WL 2552489, at *12 (noting that at Mr. Flowers's fourth trial "the prosecutor ran out of peremptory strikes before it

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[7] *See generally* Thomas Aiello, JIM CROW'S LAST STAND, NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA, (LSU Press) 2015.

could strike all of the black prospective jurors" because there was a "large number of black prospective jurors at the trial"). For instance, in a case from Orleans Parish, where African Americans comprise roughly 60% of the population, one state court observed that "[t]he composition of the venire, of which African–Americans made up more than half its number, does not provide any support [to the *Batson* claim] either. Nor can the defendant look to the composition of the final jury as indicative of prosecutors' racist intentions." *State v. McElveen*, 2010-0172 (La. App. 4 Cir. 09/28/11), 73 So. 3d 1033, 1074; *see also State v. Mason*, 47,642 (La. App. 2 Cir. 01/16/13), 109 So. 3d 429, 442 (finding no pattern where the State used "11 of its 12 peremptory challenges to excuse African–Americans" because "at the time the defendant made his challenge, a majority of the jurors, seven of the 12, were African–American"). Where the venire virtually guarantees the inclusion of minority jurors, prosecutors in Louisiana have been given a license to discriminate.

The doctrinal development most relevant to the instant petition is the basis for one of the questions presented: the Louisiana Supreme Court has embraced the position that a "defendant's reliance on bare statistics to support a *prima facie* case of race discrimination [is] misplaced." *State v. Dorsey*, 2010-KA-0216 (La. 09/07/11), 74 So. 3d 603, 617. This jurisprudential rule effectively converts *Batson* back into *Swain*. *See Swain*, 380 U.S. at 221 ("we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws"). One of the main points of *Batson* addressed *Swain*'s too-demanding standard. In explaining how and why it was breaking with *Swain*, this Court explained that

"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 (emphasis added). As this Court reiterated in *Flowers*, "the *Batson* Court held that a criminal defendant could show 'purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*.'" *Flowers*, 2019 WL 2552489, at *9 (quoting *Batson*, 476 U.S. at 96 and adding emphasis).

The result of the Louisiana Supreme Court's position that "bare statistics" cannot sustain a *prima facie* showing is that there is no discernible difference between the pre-*Batson* and post-*Batson prima facie* rulings. In *Swain* cases arising in Louisiana, it was not enough to point to statistics in the case at hand. *See*, *e.g.*, *State v. McClinton*, 492 So. 2d 162, 164 (La. Ct. App. 1986) ("Defendant has not met this burden. He merely contends all of the State's peremptory challenges in this particular case were used to exclude prospective black jurors."); *State v. Hayes*, 414 So. 2d 717, 720 (La. 1982) (where prosecutor Ralph Roy, discussed *supra*, used 14 of 18 peremptory challenges against prospective Black jurors, the Louisiana Supreme Court held that "there is no *prima facie* showing that the prosecutor's peremptory challenges of blacks were racially motivated," noting that the defense did not cite the prosecutor's discrimination in *Brown* and *Washington*). In *Batson* cases arising in Louisiana, it is still not enough to point to statistics in the case at hand. *See*, *e.g.*, *State v. Henderson*, 2013-0074 (La. App. 1 Cir. 09/13/13), 135 So. 3d 36, 46 ("defendant's only support for a *prima facie* claim of racial discrimination came from mere statistics"); *State v. Duncan*, 99-2615 (La. 10/16/01), 802 So. 2d

533, 548–49 (finding bare statistics alone were insufficient to establish a *prima facie* case where "the state had accepted twenty-two of twenty-five Caucasian-Americans [sic] prospective jurors tendered to it (88%), yet only one of six African-Americans (16%)").[8]

Louisiana's legislature has done its part to make *Batson* disappear. For instance, Louisiana has a law, in effect at the time of Mr. Turner's trial, that permitted a trial court to bypass step two of *Batson*'s three-step process and summarily end the relevant inquiry. Under Louisiana Code of Criminal Procedure article 795(C), if the defendant makes out a *prima facie* case of discrimination under *Batson*, "the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror." Justices of this Court recently observed that the Louisiana rule "permit[ting] the trial court, rather than the prosecutor, to supply a race-neutral reason at *Batson*'s second step . . . does not comply with this Court's *Batson* jurisprudence." *Williams v. Louisiana*, 136 S. Ct. 2156, 2156 (2016) (Ginsburg, J., concurring in the decision to grant, vacate, and remand). Nonetheless, the Louisiana Supreme Court refused to strike down

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[8] The legislature has similarly attempted to undercut *Batson* in favor of *Swain*. *See State v. Hampton*, 52,403 (La. App. 2 Cir. 11/14/18), 261 So. 3d 993, 1006 ("In 1986, *Batson* was codified and implemented in Louisiana when La. C. Cr. P. art. 795 was amended to provide that '[a] peremptory challenge by the state shall not be based solely upon the race of the juror.' In 1990, 'systematic exclusion' language was added to that statute. In 1993, the statute was amended to remove the 'systematic exclusion' language.").

the law. Instead, it simply expresses discomfort about it. *See State v. Crawford*, 2014-2153 (La. 11/16/16), 218 So. 3d 13, 34 (noting that it was not "decid[ing] the constitutionality of the [] clause," yet stating that "the continued scrutiny given to that article should not go unnoticed by the bench and bar of this state").[9]

Sub-part (D) of the same Article deals a devastating blow to defense counsel who seek to raise a *Batson* challenge in a case in which both defense counsel and the State struck the same juror: "[t]he provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror." La. C.Cr.P. art. 795(D). In effect, Louisiana's codification of *Batson* explicitly excludes from consideration the very prospective jurors most likely to prove the State's discriminatory intent: those the defense sought to exclude peremptorily, but whom the State deemed were worth a peremptory strike as well. When the prosecution strikes minority jurors who express pro-State views, there is stronger evidence that the State discriminated on the basis of race. Under article 795(D), however, the State is not only afforded immunity for discrimination against the pro-State minority juror, but the defense is placed in the untenable position of being forced to choose between protecting her client from pro-State jurors and protecting her client—and a prospective juror—from intentional discrimination by the State.

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[9] At the urging of *Amici*, the Governor recently signed a bill that will eliminate the problematic provision. *See* 2019 La. Sess. Law Serv. Act 235 (H.B. 477) (WEST). The law will go into effect on August 1, 2019. http://www.legis.la.gov/legis/BillInfo.aspx?s=19-rs&b=HB477&sbi=y.

The concerns with how the state judiciary and legislature have dealt with *Batson* articulated here are not exhaustive. Yet, they demonstrate that Louisiana has been a reluctant participant in the constitutional project to end racial discrimination in jury selection. Indeed, the way this Court recently described the prosecution in *Flowers* provides an excellent summary of what has happened in Louisiana: "The State appeared to proceed as if *Batson* had never been decided." 2019 WL 2552489, at *13.

CONCLUSION

Re-enforcement of *Batson* is needed in Louisiana now more than ever, particularly in East Baton Rouge Parish where evidence of racial discrimination persists. Unfortunately, the state judiciary and legislature have done their best to dismantle this Court's landmark decision. Particularly in light of this Court's decision in *Flowers*, Mr. Turner's petition for certiorari presents a worthy and timely opportunity for oversight.

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