No. 18-9710

IN THE SUPREME COURT OF THE UNITED STATES

LEE TURNER, JR.,
Petitioner

v.

STATE OF LOUISIANA
Respondent

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
FILED ON BEHALF OF THE STATE OF LOUISIANA

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NOT CURRENTLY A CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Can "mere statistics" be enough to establish a *prima facie* case of discriminatory intent under *Batson v. Kentucky*, 475 U.S. 79 (1986) and *Johnson v. California,* 545 U.S. 162 (2005)? Did petitioner present sufficient statistics to demonstrate a *prima facie* case of discrimination in this case?

Must an appellate court's review of a claim involving comparative juror analysis be limited to the prosecutor's articulated reasons for striking a particular juror, or should the appellate court evaluate those reasons against the record as a whole?

Did the evidence in this appellate record demonstrate purposeful discrimination requiring relief under *Batson?*

CITATION OF LOWER COURT OPINION

The state court's thirty-three-page ruling analyzing this Court's seminal cases, *Batson, Johnson*, and *Miller-El II,* can be found in full at ***State of Louisiana v. Lee Turner***, 2016-1841, pp. 50-83 (La. 12/5/18), 263 So.3d 337, 374-391, *reh'g denied* (1/30/19).

INTRODUCTION

Petitioner has failed to state "compelling reasons" for review on certiorari pursuant to Supreme Court Rule 10. Petitioner misinterprets the facts of voir dire as they were unfolding in front of the trial court. He also cherry-picks excerpts from

the Louisiana Supreme Court's thirty-three-page ruling on the *Batson* claims and mischaracterizes that court's overall reasons for judgment.

The Louisiana Supreme Court's ruling is a straightforward application of this Court's various relevant precedents; yet, in his first question presented, petitioner attempts to misconstrue that ruling to support an argument of law that is not in conflict with this Court's precedent and was not the basis for the Louisiana Supreme Court's ruling in this case. The Louisiana court has acknowledged that a *prima facie* case of discriminatory intent may be based on statistics in certain situations. However, the trial and appellate courts properly concluded that the statistics presented in this case did not present a *prima facie* case of discriminatory intent.

The second and third questions presented fare no better, as, once again, petitioner's current arguments bear little connection to the actual circumstances and facts as presented at the proceedings leading to the objections. For, petitioner offered no specific juror comparisons or examples of disparate questioning in the trial court, thus the prosecutor only responded regarding why she struck a particular juror, not why she kept another, which is an entirely different inquiry. The trial court did not clearly err in finding that the record supported those reasons. In analyzing petitioner's *Batson* claims, the state appellate court tested the prosecutor's articulated reasons against the record as a whole and found them to be plausible and valid. The state courts' findings were not clearly erroneous and do not merit intervention from this Court.

Because petitioner fails to prove that any of the state courts' factual rulings were clearly erroneous, or that the state courts' applications of law are in conflict with this Court's precedents, his instant writ must be denied.

STATEMENT OF THE CASE

Facts of the crime

This case involves the March 27, 2011, murders and armed robberies of Edward Gurtner III. and Randy Chaney at their place of employment, the Carquest Auto Parts Store on Airline Highway in Baton Rouge, Louisiana.

When her husband did not return from work that Sunday, and her attempts to contact him were unsuccessful, Mrs. Elizabeth Gurtner and her thirteen-year-old son drove to the Carquest. They went into the store and began looking around. In the back, they noticed Mr. Gurtner lying on the floor and realized he had been shot. Mrs. Gurtner tried to shake her husband to see if he was still alive, but he did not move. She immediately called 911. Officers quickly arrived and discovered the bodies of two deceased victims. Mr. Gurtner had been shot multiple times, while Mr. Chaney was shot once in the back of the head. It was apparent to detectives that a robbery had occurred. Money bags were scattered, numerous bullet casings were located, the safe was open, and the back door of the store was unlocked and ajar.

Officers learned that petitioner was a recent hire at another Baton Rouge Carquest store and that, earlier that Sunday, which he had off, he made two trips to

the Airline Highway store. Officers also learned that petitioner was the last person to be seen with the victims while they were still alive.

The next morning, detectives located petitioner at his place of employment, the Carquest on Government Street in Baton Rouge. He was cooperative and voluntarily accompanied detectives to the police station to assist with the investigation and "to clear his name." Officers advised petitioner of his *Miranda* rights and he signed a consent to questioning form.

Petitioner spent eleven hours speaking to detectives. The state introduced a video of the entire eleven-hour interview as State's Exhibit 173 and a transcript of the entire conversation as State's Exhibit 256. During initial questioning, he admitted to visiting the Airline Highway Carquest on the Saturday before the murders, and again on Sunday morning as the store was opening. He acknowledged seeing Mr. Gurtner's son that morning. He admitted to returning to the Airline Highway store a third time on Sunday, at approximately 2:45 p.m.. Petitioner stated that he observed an employee leave the store minutes after he arrived, and that the two remaining employees, Mr. Chaney and Mr. Gurtner, were in the process of closing the store. He advised that he unlocked the back door of the business to help Mr. Gurtner bring boxes out to the dumpster, but claimed he forgot to lock it back. He stated that when he left the store at closing time, approximately 3:00 p.m., the two victims were alone inside the store. For several hours, he denied any involvement in or knowledge of the robbery or murders.

At approximately 4:00 p.m., while detectives were still questioning petitioner, officers obtained a warrant to search the Baton Rouge residence he shared with his uncle. During the search, officers discovered numerous items, including a bundle of currency wrapped in a rubber band inside of a black plastic bag, two Regions Bank deposit bags consistent with bags used by Carquest, Carquest deposit slips from March 25 and 26, 2011, and one check made payable to Carquest Auto Parts dated March 25, 2011.

When detectives confronted petitioner with photographs of the items seized from his residence, he first attempted to blame another man, the manager of the Carquest on Plank Road. He told an elaborate story of how that man hired him under the condition that he participate in this robbery, and he claimed that man fired the gun. A short time later, investigators discovered a Beretta .380 pistol behind the Airline Highway Carquest in an overgrown area near a canal. Only when confronted with that information did petitioner finally confess to acting alone in the armed robbery and double murder. According to petitioner, Mr. Chaney called him a racial epithet and that caused him to "click out." He explained that his only problem with Mr. Gurtner was that "he was there," so he had to kill him, too. Petitioner added that he did not shoot Mr. Gurtner until after he had given him the money and had turned to run. Without being told, petitioner supplied numerous specifics related to the murders, including that: first, he shot Mr. Chaney one time; then, he shot Mr. Gurtner multiple times in the back as he attempted to flee; he

emptied the clip of his .380 caliber Beretta; and he tossed the gun behind the store as he fled out of the back door, which he left ajar.

DNA evidence revealed that petitioner could not be excluded as a contributor to the mixed sample of DNA collected from the trigger and slide of the Beretta pistol. Ballistics evidence matched the bullets from the bodies of the deceased victims and cartridge casings collected from the scene as having been fired from the .380 Beretta.

Pre-trial proceedings

On July 21, 2011, a grand jury for the parish of East Baton Rouge indicted petitioner with two counts of first-degree murder, violations of Louisiana Revised Statute 14:30. One week later, two defense capital-certified attorneys, Margaret Lagatutta and Scott Collier, were appointed to represent petitioner. Under their counsel, he waived formal arraignment and entered a plea of not guilty. Soon thereafter, First Assistant District Attorney Tracey Barbera filed the state's formal notice of intent to seek the death penalty and designation of aggravating circumstances.

Four months before trial, defense counsel submitted a motion for jury questionnaire, containing nine pages of proposed questions asking about views on race, the criminal justice system, and the death penalty. The court approved the final copy of the questionnaire in February of 2015, and distributed it to approximately 200 jurors who appeared for jury duty on March 20, 2015, for completion.

Voir dire

On April 13, 2015, the trial court began *voir dire* by conducting individual sessions to qualify potential jurors who exhibited open-minded views on the death penalty. This process continued on April, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, and 29. During that time, the parties questioned a total of 163 individuals. Forty-seven panelists remained after the death qualification round; fifteen were African American, two were Hispanic, and thirty were Caucasian. To streamline the process, the court grouped the death-qualified panelists into five groups to cover general voir dire topics.[1]

On April 24, 2015, which was the tenth day of jury selection, petitioner Turner filed a notice of objection under *Batson* and *J.E.B.*[2], wherein he solely relied upon statistical data to allege that the state had engaged in seemingly discriminatory practices, and he sought to have the state provide race and gender-neutral reasons for its exercise of six peremptory challenges made over the course of the past nine days. The trial court presided over arguments on the motion and petitioner alleged that of the twenty-nine jurors who had made it to general voir

[1] On April 15, 2015, the parties questioned Group One, consisting of seven white panelists, eight black panelists, and one Hispanic panelist from individual panels one through three. (R. pp. 2697, 2728-41.) On April 23, the parties questioned Group Two, consisting of nine white panelists, four black panelists, and one Hispanic panelist from individual panels four through nine. (R. p. 3912.) On April 27, the parties questioned Group Three, consisting of five white panelists and one black panelist from panels ten and eleven. (R. pp. 4558-71.) On April 28, the parties questioned Group Four, consisting of four white panelists and one black panelist from panel twelve (R. p. 4835.) Finally, on April 29, in hopes of finding two alternates, the parties questioned Group Five, consisting of five white and one black panelist from panel thirteen. (R. pp. 5062-75.)

[2] In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), this Court extended its holding in *Batson* and instructed that the Equal Protection Clause also prohibits discrimination in jury selection on the basis of gender. Petitioner did not assign error to this allegation on appeal; thus, this is no longer an issue for review.

dire by that point, eleven were black, sixteen were white, and two were Hispanic.[3] According to petitioner, the state had used peremptory challenges on four black females, one black male, and one Hispanic female, for no valid reasons. The state countered that it had no control over the order of persons called for questioning, but that it just so happened most of the potential jurors questioned thus far were females. The state reminded the court that it had not challenged all of the black jurors questioned thus far, and in fact petitioner had peremptorily challenged four of the eleven: Ms. Collins, Ms. Harris, Ms. Smiles, and Mr. Singleton.[4]

After considering all of the relevant circumstances in play at that point, the court made an express factual determination that there was no *prima facie* pattern of racial or gender discrimination in any of those peremptory challenges, but it required the state to articulate reasons to preserve the record. The state complied and the court held that the state's reasons were race- and gender-neutral and were supported by the record. (See State's Appendix 1, containing record pages 4278-4281 and 4867-4868.)

The next day of jury selection was Monday, April 27, 2015. That afternoon, the state used its seventh peremptory challenge to back strike Ms. Craig, a black female on panel three. At that point, the defense re-urged its objection under

[3] In actuality, twelve black potential jurors and sixteen white potential jurors survived individual questioning and made it to the group round by that point, but one black juror was lost for cause after she said she could not consider or view autopsy photographs and one white juror did not show up for the group round. (R. pp. 3961, 3970.)

[4] At the time of the April 24, 2015, *Batson* challenges, the state had used its peremptory challenges to strike five of the eleven eligible African-American jurors who had thus far been questioned, or 45%. At the same time, the defense had used four of its peremptory challenges to strike black potential jurors, thereby striking 36%.

Batson, arguing only that the state's use of peremptory challenges against black jurors "continues to be a pattern."[5] (R. pp. 4594-95.) The court asked counsel if she had any other basis to support the objection, to which she replied she did not. Then, the court reminded that it did not find a pattern before, that it found the state's previously articulated race-neutral reasons to be sufficient, and it instructed counsel to move on. (R. p. 4595.)

On April 28, 2015, the state exercised its eleventh peremptory challenge in the form of a back strike against potential juror Mr. Smith, a black male on panel two. The defense objected, alerting the court that the state had eliminated all black males from the jury. The trial court again held that it did not find a *prima facie* case of discrimination but it made the state articulate reasons for the strike. The state complied and reminded that the defense had struck the only other eligible black male. (See State's Appendix 1.) The court found the state's reasons valid and race neutral. (R. p. 4869.)

Ultimately, the state used a total of thirteen peremptory challenges. Seven of those challenges were against African-American jurors, five were against Caucasians, and one was against a Hispanic. (R. p. 587.) Petitioner used fifteen peremptory challenges. Ten were against Caucasian jurors and five were against African-American jurors. (R. p. 588.) Petitioner's twelve-person jury was comprised of nine Caucasians, two African Americans, and one Hispanic. (R. p. 1528.)

[5] By the time the state struck Ms. Craig on April 27, 2015, an additional African-American juror had been questioned and accepted by both parties, making the state's then challenge rate of the eligible African-American jurors six of twelve, or 50%. (R. p. 4591.)

The trial

The jury was sworn as a panel on April 30, 2015. The state's presentation of evidence and testimony lasted until May 3, 2015. The defense presented no evidence and rested its case the following day. Closing arguments, the trial court's instructions, and deliberations on the guilt phase followed. The jury deliberated for nearly two hours before returning with a unanimous verdict of guilty of first-degree murder on both counts. (R. p. 100.)

The penalty phase of trial lasted from May 5 through May 8, 2015.[6] Due to the state court's reversal of the penalty, that phase is largely irrelevant to the instant claims, other than noteworthy for the fact that defense witnesses included the prison warden, an expert in inmate classification, and an expert in forensic psychology. Each testified about petitioner's ability to be a model prisoner and his capacity for reform. It is undisputed that the state was aware of this defense strategy well before trial.

Post-trial motions

Petitioner's current counsel enrolled on June 17, 2015. On August 7, 2015, counsel filed a lengthy motion for new trial. (R. pp. 629-664.) She did not urge any *Batson* claims therein. The trial court denied that motion, petitioner waived all sentencing delays, and the trial court formally sentenced him to death by lethal injection. (R. pp. 6553-54.) Petitioner filed a motion to reconsider sentence, urging

[6] The jury deliberated nearly two hours before returning a unanimous verdict of death. In both counts, the aggravating circumstances the jury found beyond a reasonable doubt were armed robbery and knowingly creating a risk of death to more than one person.

that the capital sentence violated the Eighth Amendment, which the trial court denied.

The appeal

Petitioner then appealed, asserting twenty-two assignments of error. The majority of his claims focused on various trial court rulings made during jury selection. Petitioner supported his *Batson* claims (Assignments of Error 6 & 7) with nearly thirty pages of comparative juror analysis, wherein he offered specific comparisons of stricken jurors to seated jurors and he attempted to build a case for disparate questioning. The state filed a brief in response. The state court presided over oral arguments.

The Louisiana Supreme Court found merit only in petitioner's assignment of error related to his "reverse-*Witherspoon*" challenge due to the trial court's "overcorrect[ion]" of an "arguably improper" line of defense questioning at voir dire. *Turner,* 2016-1841, p. 29, 263 So.3d at 362. That error required vacation of petitioner's death sentences, but not the convictions. The state court devoted thirty-three pages of its 109-page opinion to examining petitioner's *Batson* claims and found they were without merit. *Id.* at 374-91. The court affirmed the convictions and remanded the case to the trial court for resentencing. The state did not seek rehearing, and the state supreme court denied petitioner's rehearing application without reasons.

Thereafter, petitioner filed the instant application for writ of certiorari in this Honorable Court. At this time, the state has not refiled its notice of intent to seek the

death penalty, and as the case currently sits before this Honorable Court, it is no longer a capital case.

At the request of this Honorable Court, the State of Louisiana, through undersigned appellate counsel, files this brief in response, urging this Honorable Court to deny petitioner's instant petition for certiorari.

REASONS FOR DENYING THE PETITION

Petitioner's questions presented focus on this Court's seminal decision in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), which solidified that the use of peremptory challenges to exclude persons from a jury based on their race violates the Equal Protection Clause.[7] By now, this Court is familiar with *Batson's* three-step test for determining whether a peremptory challenge was based on race. Petitioner's first question presented focuses on step one of that analysis. His remaining questions presented focus on step three. For the following reasons, petitioner fails to demonstrate any compelling reasons to exercise this Court's discretion.

I. This case does not present a decision that conflicts with relevant decisions from this Court, nor can it be considered an "outlier" with respect to other federal appellate jurisdictions.

Under *Batson* and its progeny, the opponent of a peremptory challenge must first establish a *prima facie* case of purposeful discrimination. To establish a *prima facie* case, the party opposing the peremptory challenge must show: (1) the challenge was directed at a member of a cognizable group; (2) the challenge was

[7] The Louisiana Supreme Court adopted the *Batson* holding in *State v. Collier*, 553 So.2d 815 (La. 1989). See also Louisiana Code of Criminal Procedure Article 795.

peremptory rather than for cause; and (3) the existence of relevant circumstances sufficient to raise an inference that the challenge was exercised against the venireperson on account of his being a member of that cognizable group. *Batson,* 476 U.S. at 96, 106 S.Ct. at 1723. This three-prong showing by the opponent of the challenge gives rise to "the necessary inference of purposeful discrimination." *Batson,* 476 U.S at 96, 106 S.Ct. at 1723. If the trial court determines the opponent of the challenge failed to establish the threshold requirement of a *prima facie* case, then the analysis is at an end and the burden never shifts to the party exercising the peremptory challenge to articulate neutral reasons. However, once a party provides race-neutral reasons for its peremptory challenges, the issue of whether the challenges constitute a *prima facie* pattern of discrimination becomes moot.[8] *Hernandez v. New York*, 500 U.S. 352; 111 S.Ct. 1859; 114 L.Ed.2d 395 (1991). At the third and final step, the trial court must determine if the opponent of the challenge has carried the ultimate burden of proving purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724.

A. Petitioner's rigid reliance on Johnson v. California is misplaced, as Johnson did not erode Batson's first-step inquiry.

Johnson v. California, 545 U.S. 162, 168; 125 S.Ct. 2410, 2416; 162 L.Ed.2d 129 (2005), is this Court's seminal pronouncement on first-step *Batson* inquires. The *Johnson* Court determined that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima face case" under step one of *Batson*. This Honorable Court reiterated, "a prima facie case of

[8] Indeed, the *prima facie* case determination is mooted in all but one instance here, as discussed below.

discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts 'gives rise to an inference of discriminatory purpose.'" *Johnson,* 545 U.S. at 169, 125 S.Ct. 2410, *citing Batson,* 476 U.S. at 94, 106 S.Ct. at 1712. However, this Court cautioned that this first step was not intended 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." *Johnson,* 545 U.S. 162, 170; 125 S.Ct. 2410, 2417.

Contrary to petitioner's assertion in brief, the Louisiana Supreme Court does not impose an "anachronistic rule" that ignores *Johnson*. (Petitioner's brief p. 22.) For, *Johnson'*s holding did not erode *Batson'*s directive to consider "all relevant circumstances" when determining if the "circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." 545 U.S. at 163 125 S.Ct. at 2014, citing *Batson*, 476 U.S. at 96–97, 106 S.Ct. at 1723. Nor did *Johnson* alter the burden of proof. The burden of production to prove purposeful discrimination "rests with and never shifts from the opponent of the strike." *Johnson*, 545 U.S. at 171, 125 S.Ct. at 2417. Rather, *Johnson* reiterated that the opponent of the strike can satisfy *Batson'*s first step by producing "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." 545 U.S. at170; 125 S.Ct.at 2417.

In stark contrast to the instant case, the *Johnson* statistics were staggering. There, the prosecutor used three peremptory challenges to remove 100% of all

eligible black prospective jurors, thus a *prima facie* case of discrimination was present.[9] 545 U.S. at 164, 125 S.Ct. at 2414. Because of that, the case was remanded to the California trial court for a hearing to allow the prosecutor to articulate reasons for striking those jurors. *See People v. Johnson*, 38 Cal.4th 1096; 136 P.3d 804 (2006).

However, there is nothing in *Batson, Johnson,* or other relevant jurisprudence from this Court which **requires** an automatic finding of *prima facie* case based on a pattern of strikes alone—especially where that pattern reveals a prosecutor's strike ratio of accepting six of twelve, or half, of all eligible black jurors. Indeed, this Court continues to recite *Batson's* directive that a defendant could make out a *prima facie* case of discriminatory jury selection by examining "the totality of the relevant facts" about a prosecutor's conduct during the defendant's trial. See *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005), citing *Batson,* 476 U.S., at 94, 96, 106 S.Ct. 1712; See also *Snyder*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170, citing *Miller-El II*, 545 U.S. at 239, "[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be

[9] The remaining cornucopia of *Batson* jurisprudence from this Court consists of third-step cases where the first step of *Batson's* three pronged inquiry was either conceded or otherwise not at issue, given the extreme statistics present in the pattern of strikes. See e.g.: *Flowers v. Mississippi*, 139 S.Ct. 2228, 2235; 204 L.Ed.2d 638 (2019) (Calling the prosecutor's peremptory challenges of forty-one of forty-two, or 97%, of eligible minority jurors over the course of six trials "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.") See also *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (parties conceded prima facie case present where prosecutors used peremptory strikes to exclude ten of eleven, or 91%, of the eligible African–American venire members) and *Foster v. Chatman*, 136 S.Ct. 1737, 1742, 195 L.Ed.2d 1 (2016) (parties conceded *prima facie* case of discrimination where state peremptorily struck all four eligible black prospective jurors, or 100%).

consulted." The *prima facie* case inquiry remains highly fact intensive and should be decided based on all relevant circumstances.

For nearly thirty-five years, this Honorable Court has left to the trial courts the task of implementing *Batson*. Just last year, this Court declined the call to clarify how state courts should interpret the meaning of "a pattern of strikes" when proceeding under the first step of the *Batson* test. See e.g. *Harris v. Dunn*, 138 S.Ct. 2577; 201 L.Ed.2d 294 (2018)(second question presented). Albeit, *Harris* arose in the habeas context, but the inquiry remains the same. The reality is that in some situations, a pattern of strikes might give rise to an inference of discrimination; in others it might not. This Court continues to task trial judges, who "operate at the front lines of American justice" with recognizing when that inference exists. *Flowers* v. *Mississippi*, 139 S.Ct. 2228, 2243; 204 L.Ed.2d 638 (2019), citing *Batson* 97, 99, n. 22.

B. The Louisiana court did not expressly rule that statistics can never be enough to support a prima facie case of purposeful discrimination. Instead, it applies Batson based on the totality of the circumstances presented in each case, which remains the intent of Batson.

When faced with similarly staggering statistics, the Louisiana Supreme Court has invoked *Johnson* to warrant remand for a *prima facie* case determination. See *State v. Drake*, 2008-1194 (La. 1/30/09), 2 So.3d 416, 417, citing *Johnson,* 545 U.S. at 170, 125 S.Ct. at 2417, wherein the state peremptorily excluded eight out of the ten eligible African–American jurors, or 80%. See also *State v. Maxwell,* 08–1007 (La.App. 4 Cir. 8/19/09), 17 So.3d 505, reversed and remanded by, 2009-2235 (La. 4/16/10), 33 So.3d 155 (Court-ordered remand to allow state to cite reasons for

strikes where state peremptorily struck nine of eleven eligible African–Americans, or 81%, from the jury.) Contrast *Drake* and *Maxwell* with *State v. Odenbaugh*, 2010-0268, p. 21-22, (La. 12/6/11), 82 So.3d 215, 235–36, *cert denied*, 568 U.S. 829, 133 S.Ct. 410 (Mem), 184 L.Ed.2d 51 (2012), wherein the state court declined to find a *prima facie* case based solely on numbers where the state removed three of the seven black prospective jurors and the defense excluded four.

The Louisiana Supreme Court also expressed its understanding of *Johnson* in *State v. Draughn*, 2005-1825, pp. 25-26 (La. 1/17/07), 950 So.2d 583, 602, *cert denied*, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007):

> Our review of the entire voir dire convinces us that the mere invocation of *Batson* when minority prospective jurors are peremptorily challenged in the trial of a minority defendant does not necessarily present sufficient evidence in this case to lead to an inference of purposeful discrimination. There is nothing in *Batson,* or indeed in *Johnson,* which would require such an automatic finding. Otherwise, there would be no need for the first *Batson* step in the trial of any defendant who was a member of a cognizable racial group whenever a peremptory challenge was raised to a prospective juror who was also a member of that racial group; the Supreme Court's holding in *Johnson* did not collapse the first step in the *Batson* analysis. We do not believe that *Batson* or *Johnson* can be read so broadly.

These holdings are not in conflict with this Court's precedent, nor are they any different from the vast majority of outcomes in federal circuits. For, while many federal circuits agree that a pattern of strikes against eligible black jurors **might** give rise to an inference of discrimination, none hold that "bare statistics" **must** give rise to such inference. See e.g. *DeVorce v. Phillips*, 603 Fed.App'x 45, 46 (2d Cir. 2015), citing *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002) (emphasis

added). ("[S]tatistics, alone and without more, can, **in appropriate circumstances** be sufficient to establish the requisite prima facie showing under *Batson* . .."); See also *Bennett v. Gaetz*, 592 F.3d 786, 791 (7th Cir. 2010), (Recognizing that although the first-step bar is light, "it is an essential part of the *Batson* framework," and "trial courts may justifiably demand that defendants carry this burden before requiring prosecutors to engage in the difficult task of articulating their instinctive reasons for peremptorily striking a juror.") See also *Scott v. Gelb*, 810 F.3d 94, 101 (1st Cir. 2016) (emphasis added), internal citations omitted:

> While one sustained *Batson* (or equivalent) challenge to a peremptory strike could **in some instances** raise an inference of discriminatory intent, that is **not always the case**. Instead, consistent with the Supreme Court's mandate in *Snyder,* we must consider other factors including but not limited to "the number of strikes involved in the objected-to conduct; the nature of the prosecutor's other strikes; and, as the 'capstone,' the presence of an alternative, race-neutral explanation for the strike."

When extreme disparities are present in the strike ratios, courts have found "inferences of discrimination." See e.g. *Adkins v. Warden, Holman* CF, 710 F.3d 1241, 1255 (11th Cir. 2013) (inference of discrimination present where state peremptorily struck nine of eleven eligible black jurors and one black juror served on jury); *Howard v. Moore*, 131 F.3d 399, 407 (4th Cir. 1997)(prosecutor's striking of six out of seven eligible black prospective jurors constituted a *prima facie* case of discrimination); *Price v. Cain*, 560 F.3d 284, 287 (5th Cir. 2009) (*prima facie* case existed where state used six of its peremptory challenges to strike all African-Americans from the venire).

Less staggering statistics might not equal a *prima facie* case of purposeful discrimination. See e.g. *Gonzalez v. Brown*, 585 F.3d 1202, 1209–10 (9th Cir. 2009) (finding the evidence raised to support an inference of discrimination was not "stark" where prosecutor used four peremptory strikes, three of them against African–American jurors, but three potential African–American jurors remained on the panel, two were seated in the jury box, and the prosecutor had six peremptory strikes left to exercise). See also *Bennett*, 592 F.3d at 791 (that prosecution peremptorily challenged two of four eligible African–Americans was not significant enough to equal a *prima facie* case). In practice, it appears that each *Batson* analysis will turn on the peculiarities of the proceedings before the court, as it should.

As evidenced by its collection of caselaw, the Louisiana Supreme Court demonstrates a concise and accurate understanding of *Johnson*—that the burden of production in the first *Batson* step remains squarely on the opponent of the challenge. Defense counsel's mere invocation of *Batson* via "it continues to be a pattern," when the state peremptorily challenged Ms. Craig does not present sufficient evidence of discriminatory intent, especially when considering that the prosecutor had: (1) accepted half of the eligible African- American jurors questioned at that point (six of twelve) and (2) articulated legitimate, race-neutral reasons for each of its prior strikes. Without further argument to the trial court, or additional reasons presented by the defense, the trial judge had nothing from which to draw an inference of purposeful discrimination.

C. The only prima facie case issue not mooted by the state's articulated reasons is that against Ms. Craig, and the state court thoroughly and adequately assessed the "totality of the relevant facts" to conclude that petitioner did not surpass his step-one burden.

At the outset of its analysis of the *Batson* claims, the Louisiana Supreme Court noted the mootness of the *prima facie* case determinations, with the exception of that against prospective juror Ms. Craig. *Turner*, 2016-1841, p. 53, 263 So.3d at 375, citing *Hernandez*, 500 U.S. at 359, 111 S.Ct. 1859. In reviewing the trial court's declining to find a *prima facie* case against Ms. Craig, that court summarized the events below and held in full,

> The state used its seventh peremptory challenge to back strike [Ms.] Craig, a black female. 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, Ms. Jule. Defense counsel noted that although the court had denied its earlier *Batson* challenges as to the state's first six challenges, "this continues to still be a pattern." The court responded:
>
> > Well, I didn't find there was a pattern [before]. I made [the state] give her reasons and found [the state's] reasons were race neutral and gender neutral. *386 And do you have something else other than [that the state] used a peremptory on another one?"
>
> Defense counsel responded in the negative: "No, your Honor," to which the court responded, "All right," before the court moved on to consider the next available jurors, implicitly finding that defendant had again failed to make a prima facie showing under the first step of *Batson*.
>
> The 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, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) (because *Batson* did not mean to impose an onerous burden as the first step in its analysis, a defendant need produce only "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.").
>
> This Court has held, however, that bare statistics alone are insufficient to show a prima facie case of discrimination. **73 *State v. Duncan*, 99-

2615, p. 22 (La. 10/16/01), 802 So.2d 533, 550 (citing *United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990)). In *Duncan*, the defendant argued that racial discrimination could be inferred from the record, which showed the state had struck 84% of prospective black jurors and only 12% of prospective white jurors, using five of its eight peremptory challenges to strike black jurors. This Court held, "there is not a per se rule that a certain number or percentage of the challenged jurors must be black in order for the court to conclude a prima facie case has been made out." 99-2615 at p. 22, 802 So.2d at 549-50. However, the Court explained that "such number games, stemming from the reference in *Batson* to a 'pattern' of strikes, are inconsistent with the inherently fact-intense nature of determining whether the prima facie requirement has been satisfied." 99-2615 at p. 22, 802 So.2d at 550. This Court further explained that it is important for a defendant to come forward with facts, not numbers alone, when asking the trial judge to find a prima facie case. *Id.* (citing *Moore*, 895 F.2d at 485). Consequently, in *Duncan* this Court held the defendant's reliance on bare statistics to support a prima facie case of race discrimination was misplaced.

Here, despite statistical support for an inference of discrimination, when the court ruled on this particular *Batson* challenge, it had just found that the state's use of its prior six challenges to remove five black and one Hispanic juror did not involve purposeful discrimination. Thus, it was not against a blank slate that defendant made the objection with respect to Ms. Craig; rather, the court had already determined that defendant had failed to show that the state engaged in any purposeful discrimination in its first six challenges, and thus the state's seventh challenge, albeit made against another black juror, was to some extent set apart from the first six. In effect, by arguing to the court that using six out of seven challenges against black jurors revealed a pattern of discrimination, defendant was attempting to piggy-back this **74 seventh objection onto his earlier (failed) objections concerning state's first six challenges, which had already been deemed non-discriminatory. 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. Because defendant has failed to offer any other evidence from which to infer discriminatory intent, the trial court did not abuse its discretion in finding that defendant had *387 not made a prima facie case with respect to [Ms.] Craig.

Turner, p. 72-74, 263 So.3d at 385–87.

The Louisiana court was precisely correct that defense counsel did no more than "piggy back" this seventh strike off of the first six. In determining that no *prima facie* pattern of racial discrimination existed with respect to the first group of *Batson* objections (those lodged on April 24, 2015), the trial court rendered the following ruling, demonstrating he was closely following along with voir dire:

> I heard what you said and I'm looking at the challenge sheet. It has been kind of a unique jury venire. The people that made it through to get to the point where the state, or the defense, for that matter, would be even be in a position to exercise a peremptory challenge—I don't think you can go just by the race and whether or not they were challenged. And considering everything, I don't find that there's a prima facie case.

(R. p. 4275). Petitioner fails to prove that the trial court's findings, with respect to either the first group of *Batson* objections, or to the parlayed challenge against Ms. Craig, were clearly erroneous.

The problematic nature of relying on pure "number games" as petitioner seeks to do is that statistics are fluid and can easily be manipulated, often resulting in misleading and irrelevant conclusions. See *Flowers,* 139 S.Ct. 2228, 2261 (Thomas and Gorsuch, J.J., dissenting). The state does not dispute the fact that at the time of the first *Batson* challenges, it had used five of six challenges, or 83% of its then-total strikes against African Americans. Nor does it dispute that at the time of its seventh strike against Ms. Craig, it had used six of seven strikes against African Americans, or 85%. However, when one bases an entire argument on "bare statistics," **all** statistics become relevant. An accurate picture of what was unfolding in front of the trial court may only be painted by also considering the parties' ratios

of stricken black jurors to the total of eligible potential black jurors in the jury pool—something petitioner wholly fails to mention. Considering that the state had accepted half of the eligible black jurors (six of twelve) at the time of the *Batson* objection against Ms. Craig, the pattern of strikes **alone** remained insufficient to support any inference of purposeful discrimination.

For these reasons, defense counsel's in-court argument that the pattern continued—without more—was not enough to support a *prima facie* case of purposeful discrimination against Ms. Craig. Petitioner fails to prove either that the trial court's ruling was clearly erroneous or that the appellate court erred in sustaining the trial court's findings on appeal.

II. The Louisiana Supreme Court properly applied the appropriate rule of law to the facts and arguments before it. That finding is not in conflict with any decisions of this Court.

Contrary to petitioner's current argument, which bears little connection to the actual circumstances and facts as presented at the proceedings leading to the objections, the Louisiana Supreme Court's analysis represents an accurate appreciation of *Miller-El II* and its progeny.

On appeal, petitioner complained regarding the trial court's denial of his *Batson* challenges, arguing the state impermissibly struck seven black potential jurors based upon their race. He supplemented his argument by comparing various stricken black jurors to seated white jurors. In connection with its review of the trial court's denial of petitioner's *Batson* challenges, the state court thoughtfully considered petitioner's allegations, including his specific comparisons. See *Turner,*

2016-1841 p. 55-83, 263 So.3d 376-391. More importantly, that court carefully analyzed the plausibility of the state's proffered reasons in light of the record and all of the relevant circumstances, including: side by side comparisons of jurors (not just comparisons of the select details petitioner sought to compare); consideration of juror questionnaires and in-court voir dire responses; and comparisons of alleged disparate treatment of similarly situated jurors.

Now, in an attempt to bypass the Rule 10 writ considerations and get this case before this Honorable Court, defendant chastises the state court for responding to his specific comparative analysis, offered for the first time on appeal. (Pet. Brief p. 34.) However, the state court did not supply or substitute its own reasons for the state's strikes, nor did it offer post hoc justification for those strikes. It is disingenuous to accuse the appellate court of impermissibly relying on record portions not referenced in the trial court when these specific arguments were never made in the trial court. For, asking someone why she struck a particular juror is an entirely different inquiry from asking why she kept another. It is near impossible to fault the prosecutor, let alone the state court, for replying to the issue as couched at the time of framing.

This Court recently reiterated that the ultimate inquiry faced by trial court judges in deciding challenges under *Batson* is "whether the state was motivated in substantial part by discriminatory intent." *Flowers*, 139 S.Ct. 2244, *citing Foster,* 136 S.Ct. at 1754. In making these determinations, "the trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and

circumstances, and in light of the arguments of the parties." *Flowers*, 139 S.Ct. 2243. This Court has identified "all relevant facts and circumstances" as: statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors; disparate questioning and investigation of black and white prospective jurors; side-by-side comparisons of black jurors who were struck and white jurors who were not; a prosecutor's misrepresentations of the record when defending the strikes; relevant history of the State's strikes in past cases; and any other relevant circumstances that bear upon the issue of racial discrimination. *Flowers*, 139 S.Ct. at 2243, citing *Foster*, 136 S.Ct. 1737; *Snyder*, 552 U.S. 472; *Miller-El II,* 545 U.S. 231; and *Batson*, 476 U.S. 79.

The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether those reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. *Flowers*, 139 S.Ct. at 2243. With respect to these determinations, the trial judge's assessment of the prosecutor's credibility is important because, "'the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.'" *Flowers,* 139 S.Ct. at 2243, quoting *Snyder* 552 U.S. 472, 477. Such determinations of credibility and demeanor lie peculiarly within a trial judge's province. *Flowers,* 139 S.Ct. at 2243.

With respect to the role of appellate review, this Court reminds that the trial court's credibility findings are ordinarily given great deference. On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is

clearly erroneous. *Flowers,* 139 S.Ct. 2244, citing *Snyder,* 552 U.S. at 479, 128 S.Ct. at 1203. Under this standard, this Court "will not reverse a lower court's finding of fact simply because [it] would have decided the case differently." *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (internal quotation marks omitted). Instead, a reviewing court must ask "whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.' " *Ibid.* (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

A. Because petitioner failed to present any specific examples of comparative analysis or disparate questioning to the trial court, it is near impossible to find the trial court clearly erred in failing to consider them.

Although defense trial counsel accused the state of discriminatorily using its peremptory challenges to challenge black jurors while not striking "white jurors who said the same thing," the defense requested more time from the court to find the instances in the record to support its speculative allegation. (R. p. 4282.) That request was denied, and for good reason. Petitioner filed his *Batson* objection the morning of April 24, 2015 (the tenth day of jury selection), and the court deferred arguments until after lunch. The two experienced trial counselors were assisted throughout voir dire by a jury consultant, a mitigation specialist, and an investigator. (R. p. 4287.) Petitioner similarly failed to produce this evidence to the trial court in his motion for new trial, filed some six weeks after trial. Importantly, petitioner never presented a single specific juror in comparison to another in the trial court. It was not until his brief on direct appeal when petitioner first sought to

selectively compare particular jurors, and he made those comparisons in a vacuum. Arguably, defendant forfeited this argument altogether by failing to present it to the trial court. See *Flowers*, 139 U.S. at 2260 (Thomas and Gorsuch, J.J., dissenting) ("[I]f the defendant makes no argument on a particular point, the trial court's failure to consider that argument cannot be erroneous, much less clearly so.")

The majority in *Flowers* highlighted this logical distinction, too. For, one of the key evidentiary and procedural takeaways from *Batson* remains, "what factors does the trial judge consider in evaluating whether racial discrimination occurred?" 139 S.Ct. at 2243. Again, the only defense argument in support of purposeful discrimination ever presented to this trial court was partial statistics—the state used five of six, then six of seven, then seven of eleven strikes against African Americans. Completely absent from those defense arguments were any references to strike ratios (running or final tallies), specific comparative juror analyses, examples of disparate questioning, or any other evidence that could somehow reasonably support an inference of purposeful discrimination.[10] "Excusing the defendant from making his arguments before the trial court encourages defense counsel to remain silent, prevents the State from responding, deprives the trial court of relevant

[10] By the end of jury selection, the state used seven strikes against fourteen eligible African Americans, for an overall strike ratio of 50%; one strike against two eligible Hispanics, for a 50% strike ratio; and five strikes against thirty eligible Caucasians, for a 16% strike ratio. Petitioner used five strikes against eligible African Americans, giving him a 36% strike ratio; none against eligible Hispanics; and ten against eligible Caucasians, for a 33% strike ratio. The state's final pattern of strikes revealed that seven of its thirteen strikes were against African Americans, or 54% of all strikes. The defense used five of its fifteen total strikes, or 33%, against African Americans.

arguments, and denies reviewing courts a sufficient record" *Flowers,* 139 S.Ct. at 2259-60, (Thomas and Gorsuch, J.J., dissenting), citing *Snyder,* at 483; *Garraway v. Phillips*, 591 F.3d 72, 76-77 (2nd Cir. 2010). A perfect example of this is evidenced in the fact that, other than articulating her reasons for striking a particular juror, the prosecutor has never had an opportunity to defend her questions, responses, or ultimate decisions regarding why she kept one juror over another to the trial court.

B. The Louisiana Supreme Court's responsive analysis to specific juror comparisons is not novel, but utilizes all relevant circumstances in the record to confirm or dispel the specific comparisons offered for the first time on appeal.

This Court first discussed comparative juror analyses in *Miller-El II,* 545 U.S. at 241, 125 S.Ct. 2325, stating, "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." The state court further cited *Miller-El II's* pronouncement, "There is no need for jurors to share every characteristic in order for a comparison to be meaningful. . . 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." *Turner*, 2016-1841, p. 58, 263 So.3d at 381, citing *Miller-El II*, 545 U.S. at 306. Petitioner takes particular issue with the state court's reference to *Hebert v. Rogers*, 890 F.3d 213, 223 (5th Cir. 2018), *certiorari denied by*, 139 S.Ct. 1290; 203 L.Ed.2d 416 (2019), for the proposition that, "While a comparator-juror is not required to be identical in all regards, the comparator-juror must be similar in the relevant characteristics." This

is an accurate extrapolation of this Court's statements in *Miller-El II*. The *Hebert* court stated what every experienced litigator and trial judge knows to be true: no two jurors are ever exactly alike. Neither the Louisiana Supreme Court nor the Fifth Circuit expresses a novel viewpoint on this issue.

C. None of the conclusions reached by the Louisiana Supreme Court were clearly erroneous, and the trial court's findings are supported by the record.

Petitioner now focuses on three potential jurors against whom he claims the state purposefully discriminated. In response to those arguments on appeal, the Louisiana Supreme Court carefully evaluated the record and found no error in the trial court's denial of petitioner's *Batson* objections. The prosecutor's articulated reasons for exercising its peremptory challenges, including those against potential jurors Weir, Price, and Smith are supported by the record and remain plausible, valid reasons in light of the record as a whole.

1) Petitioner views each of the state's reasons offered against Ms. Weir in a vacuum; the record supports each of those reasons.

The state used its third peremptory challenge to strike Morgan Weir, a black female from panel four, who was questioned in Group Two. In finding no evidence of purposeful discrimination against Ms. Weir, the state court first focused on the prosecutor's articulated reasons, then considered the comparative analysis of alleged similarly situated white jurors offered by defense appellate counsel. (See State's Appx. 1.) It concluded, "each white juror whom defendant argues gave similar answers differed significantly enough from Ms. Weir so as to preclude any

meaningful comparison and negate any inference of discriminatory intent." *Turner*, 2016-1841, p. 60, 263 So.3d at 379.

However, the state court's analysis did not end there. It acknowledged the state's articulated references to Ms. Weir's body language and her concerns with officers' use of misleading interrogation techniques. *Id*. at 379.[11] The court correctly noted that, "Defendant focuses on each reason the state gave for striking Ms. Weir in a vacuum, without acknowledging that Ms. Weir exhibited several characteristics undesirable to the state, and not just one, that it found excusable in another juror." *Id.* at 381. The state court did not clearly err in finding that Ms. Weir's voir dire answers as a whole supported the state's proffered reasons for striking her, and that court's finding must be afforded deference on review.

2) Petitioner failed to show that the state treated Ms. Price any differently from any similarly situated white juror.

The state used its fourth peremptory strike to back strike Ms. Price, a black female from panel two who was questioned in Group One. The state court tested the record against the state's articulated reasons and agreed that the record supported the state's concerns about Ms. Price's focus on recidivism, youthfulness, and hesitancy to "just put[] people in prison." *Turner*, 2011-1841, p. 64, 263 So.3d at 382. (See State's Appx. 1.) The state court recognized that other jurors did "check the box" on jury questionnaires agreeing with the statement that "people in prison have the opportunity to turn their life around and seek forgiveness and peace," just as

[11] Body language has been found to be a race-neutral reason defeating a *Batson* claim. See *United States v. Bentley-Smith*, 2 F.3d 1368, 1383 (5th Cir. 1993); *Messiah v. Duncan*, 435 F.3d 186, 200 (2d Cir.2006); *Barfield v. Orange County*, 911 F.2d 644, 648 (11th Cir.1990), *cert. denied*, 500 U.S. 954, 111 S.Ct. 2263, 114 L.Ed.2d 715 (1991); and *Thaler v. Haynes*, 130 S.Ct. 1171, 175 L.Ed. 1003, 78 USLW 3469 (2010).

Ms. Price had. However, the court recognized that those people did not follow up on that sentiment in their *voir dire* answers, like Ms. Price did. *Id.* at 382. Given that the state knew petitioner's penalty-phase focus would be his youthfulness, good behavior, and his capacity for reform, it is no wonder the state struck her for this reason. The state court's conclusion that petitioner failed to show that any similarly-situated white juror was treated differently than Ms. Price was not an erroneous appreciation of the facts and it must be upheld.

3) Mr. Smith's handwritten answer "to reform a person" as being the best reason not to impose the death penalty made him factually distinct from any other juror and a less than ideal juror for the state.

Finally, on April 28, 2015, the state exercised its eleventh peremptory challenge (its seventh against a black potential juror) in the form of a back strike against potential juror M. Smith, a black male from panel two and questioned in Group One. In finding no case for purposeful discrimination based on race, the state court first addressed the state's proffered reason, that she could not "let go of" Mr. Smith's questionnaire response concerning the best reason not to impose the death penalty, which he hand wrote on his jury questionnaire as, "to reform a person." (See State's Appx. 1.) Although many jurors alluded to reform/redemption in their in-court responses to voir dire, Mr. Smith was the only eligible juror to write that answer on his form. The state court rejected the notion that the state's reasons were pretextual:

> Agreeing with a generalization that a person may have the opportunity to be reformed in prison is not the equivalent of believing that potential for reform is the *best* reason not to impose the death penalty—particularly when, as in this case, the state knew that the

> defense would rely on evidence meant to suggest defendant's promising chances at reform in arguing for a life sentence during the penalty phase.[12]

The state court soundly rejected petitioner's contention that the state's rebuttal argument with respect to Mr. Smith, "And that goes back to the problem, the remorse and redemption. The same reason we challenged people who work in the prisons" (See State's Appx. 1) was an "afterthought" or "second reason" but more properly classified it as "reasserting that Mr. Smith's statements during questioning were further proof of his views on reform and remorse, which were the stated reason for the strike." *Turner*, 2016-1841, p. 76-78, 263 So.3d 388-89. The state court properly concluded, "this situation does not rise to the level of that in *Miller-El II*, where the state's second, unrelated reason for striking a juror "reek[ed] of afterthought." *Id.* at 389.

Even in the event a prosecutor's reason could be deemed pretextual, *Miller-El II* made clear that the *Batson* third-step inquiry does not end there. 545 U.S. at 241; 125 S.Ct. at 2325. Rather, *Miller-El II* acknowledges that is evidence to be considered when reaching the determination of whether discrimination occurred. *Miller-El II* does not prohibit a reviewing court from considering all other evidence

[12] In *Davis v. Ayala*, 135 S.Ct.2187, 2201, 192 L.Ed.2d 323 (2015) this Court also recognized the "fine judgment calls" which necessarily occur in capital-case jury selection:

> In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor.

in the record to reach the ultimate determination. To the contrary, this Court's repeated precedents encourage evaluating the entire record–not just portions related to the prosecutor's stated reasons–to determine whether purposeful discrimination has occurred. That is precisely what the state court did here.[13] When considering the record as a whole, the state court's determinations are not clearly erroneous and must be given deference on appellate review.

III. The state court's interpretation and application of *Batson* remains in line with this Court's precedent. The facts in this appellate court record simply do not support a case of purposeful discrimination.

The state court also rejected petitioner's reliance on *Miller-El II* in an attempt to prove disparate questioning, noting that petitioner's language that the state "tended to" and "more likely to" question black jurors more aggressively about their views on the death penalty did not rise to the level of disparate questioning present in *Miller-El II. Turner,* 2016-1841*,* p. 81, 263 So.3d 390-91. That was not an erroneous finding, given that the questioning in *Miller-El II* broke heavily and significantly along racial lines (*i.e.*, 100% of black panelists asked certain questions versus 27% of non-black panelists). Whereas here, petitioner's only quantified "proof" of disparate questioning involved the state's questioning of thirteen

[13] At their core, petitioner's arguments to this Court endorse an appellate court's selective review of an appellate record, something that is in direct contravention of *Batson*'s "all relevant circumstances" directive, as well as this Court's most recent reiteration in *Flowers* to consider "all of the relevant facts and circumstances." 139 S.Ct. at 2243. See also *Foster,* 136 S.Ct. at 1748. Should this Court adopt petitioner's argument that an appellate court must ignore large portions of a record to answer an argument presented for the first time on appeal, then even giving petitioner his prayed for relief (reversal of conviction and remand for new trial) would serve no legitimate purpose, as any future appellate court would similarly be hamstrung in deciphering the issue presented, as it, too, could only rely on certain portions of the record when writing its opinion. This approach defeats the very purpose of appellate review.

potential jurors (five white, eight black) who answered on their jury questionnaire that they or someone they knew had been the victim of a homicide or armed robbery. *Turner*, 2016-1841, p. 81–83, 263 So.3d at 389–91. Regrettably, petitioner's statistics fail to take into account the questions being asked by his counsel on this subject that may have negated the state's need to follow up—for this was a significant issue for the defense to address, too, given his extensive mitigation presentation regarding petitioner's alleged exposure to many traumatic events. [14] In any event, the state court was properly unpersuaded by that.

Finally, the state court noted that "other factors" were present in *Miller-El II*, which required action from this Court. Those included jury shuffling, the state's failure to strike similarly situated white jurors who gave responses similar to those used to justify a peremptory strike of a non-white juror, and a history of systemic discrimination of black people from jury panels by the district attorney's office during the time of defendant's trial. The state court correctly found that none of those issues were present here. *Turner*, 2016-1841, p. 83, 263 So.3d at 391.

Several factors also collided in *Foster* to indicate purposeful discrimination: in addition to the state's elimination of all eligible black jurors from the jury pool, there was "compelling" evidence that the prosecutor's proffered reason for striking a black panelist applied just as well to an otherwise-similar nonblack panelist who

[14] This is a prime example of the points illustrated by Justice Thomas in his *Flowers* dissent regarding statistical disparities that are "caused by a particular factor [and] require[] controlling for other potentially relevant variables" and a "statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation." 139 S.Ct. at 2262 (Thomas and Gorsuch, J.J., dissenting).

was permitted to serve, this Court also cited "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file" to conclude that the prosecutor's peremptory challenges were "motivated in substantial part by discriminatory intent." *Foster*, 136 S.Ct. at 1754.

Another troublesome set of circumstances arose in *Flowers,* wherein this Court considered "four critical facts, taken together, requiring reversal." The first two factors focused on the state's abysmal strike record, accepting only one of forty-two eligible minority jurors over the course of six trials. The third factor involved "dramatically disparate questioning of black and white prospective jurors" and the fourth factor was the state's strike against at least one black prospective juror who was similarly situated to white prospective jurors who were not stricken, as both the stricken juror and other, non-stricken jurors knew potential witnesses in the case. *Flowers,* 139 S.Ct. at 2246. Even there, this Court found that the problematic strike (that against juror Wright) could not be considered in isolation, although it acknowledged that, "In a different context, the Wright strike might be deemed permissible. But we must examine the whole picture. . . . .. in the context of all the facts and circumstances." *Flowers,* 139 S.Ct. at 2250.

When examining the "whole picture" of the instant case, there is no compelling reason to exercise this Court's judicial discretion. The instant crime occurred in 2011. The case went to trial in 2015. It involved experienced, professional attorneys on both sides and was tried in front of a veteran trial judge, who was well-versed in ferreting out discrimination. Here, the prosecutor ultimately

accepted half of all eligible minority jurors, or seven of fourteen African Americans and one of two Hispanics. The defense struck more than one-third of all eligible black jurors, or five of fourteen. Ultimately, two black jurors, one Hispanic juror, and nine white jurors served on petitioner's jury.

The Louisiana Supreme Court thoroughly responded to the specific comparative analysis and allegations of disparate questioning offered by petitioner in brief. It tested the authenticity of the articulated reasons offered by the state against the record as a whole and properly found no evidence of purposeful discrimination. Petitioner fails to show that the state court decided any question of law in a manner that conflicts with any relevant decision from this Court. All of the relevant facts and circumstances taken together establish that the trial court did not err in denying any of petitioner's *Batson* challenges and the instant application for writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully requests that this Court deny petitioner's application for writ of certiorari.

RESPECTFULLY SUBMITTED,

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No. 18-9710

IN THE SUPREME COURT OF THE UNITED STATES

LEE TURNER, JR.,
Petitioner

v.

STATE OF LOUISIANA
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
FILED ON BEHALF OF THE STATE OF LOUISIANA

STATE'S APPENDIX 1

WOULD CONSIDER THE DEATH PENALTY. AGAIN, THAT WOULD JUST BE FROM A READING OF THE FORM. BUT EVEN AGAIN IN HER OWN HANDWRITING UNDER 75: WHAT IS YOUR OPINION OF THE DEATH PENALTY FOR A CONVICTED MURDERER? THAT MAY GIVE CONSOLATION TO THE FAMILY, BUT IT DOES NOT BRING THEIR LOVED ONES BACK. SHE INDICATED SHE THOUGHT PENALTIES WERE TOO HARSH. WE SHOULD FOCUS ON REHABILITATION. AND SHE ALSO EXPRESSED A FOCUS UPON REMORSE WHEN BEING QUESTIONED AS A REASON THAT SHE THOUGHT WOULD BE IMPORTANT NOT TO IMPOSE THE DEATH PENALTY. AND THE STATE DOES NOT WANT INDIVIDUALS ON THE JURY WHO WOULD MAKE THE REMORSE THEIR PRIMARY FOCUS. IT CAUSES US CONCERN.

AS TO MS. WEIR, NUMBER 38 [SIC], SHE EXPRESSED A GREAT DEAL OF CONCERN THROUGH BODY LANGUAGE AS WELL AS HER COMMENTS ON THE RECORD DURING THE STATE'S INQUIRY WITH THE GENERAL PANEL AS TO ANY MISREPRESENTATIONS, JUROR -- EXCUSE ME -- POLICE OFFICERS MAY MAKE WHEN INTERROGATING INDIVIDUALS. THERE WAS ALSO FURTHER QUESTIONING ABOUT DNA EVIDENCE AND WHETHER OR NOT -- WHAT SHE THOUGHT ABOUT IT. AND HER IMMEDIATE QUESTION TO -- I BELIEVE IT WAS MS. LAGATUTTA SHE WAS A SPEAKING TO -- WAS SHE WANTED TO KNOW THE DIFFERENCE BETWEEN FIRST AND SECOND DEGREE MURDER, WHICH CAUSED THE STATE SOME CONCERN AS TO THE BURDEN OF PROOF IN HER MIND FOR THE FIRST AND SECOND DEGREE DUE TO THE DIFFERENCES IN THE PENALTIES. SHE TOO EXPRESSED A VERY SERIOUS CONCERN ABOUT IMPOSING THE DEATH PENALTY AND WHEN IT MIGHT BE NECESSARY. SPECIFICALLY: WHAT DO YOU

THINK IS THE BEST REASON TO IMPOSE THE DEATH PENALTY? SHE WROTE: IF THE PERSON HAS SHOWN THEMSELVES TO BE A THREAT TO OTHERS MULTIPLE TIMES AND ALL OTHER OPTIONS HAVE BEEN EXHAUSTED. WHAT IS THE BEST REASON NOT TO IMPOSE IT? NUMBER 78. IF THE PERSON IS REMORSEFUL AND TAKEN RESPONSIBILITY FOR WHICHEVER ACTIONS MAY HAVE OCCURRED. IF YOU BELIEVE IN THE DEATH PENALTY, UNDER NUMBER 82, UNDER WHAT CIRCUMSTANCES DO YOU FEEL THE DEATH PENALTY IS THE APPROPRIATE PENALTY AND WHY? SHE SAID: WHEN WHOMEVER JUST CANNOT STOP HARMING OTHERS. MY QUOTE FROM HER WHEN I WAS DISCUSSING THIS WITH HER IS THAT SHE WOULD NEED TO KNOW THIS PERSON IS NOT GOING TO STOP HURTING PEOPLE. THAT'S WHEN THE DEATH PENALTY MAY BE NECESSARY. I AM AWARE OF WHO HAS BEEN SUBPOENAED BY THE DEFENSE TO TESTIFY IN THE PENALTY PHASE, SHOULD WE REACH THAT POINT. AND I DO KNOW THAT -- OR I DO BELIEVE THAT THEY WILL BE FOCUSING UPON HIS LIFE IN THE PARISH PRISON FOR THE PAST FOUR YEARS, HOW HE HAS NOT INJURED ANYONE OR CAUSED ANY PROBLEMS.

AND, MS. LAGATTUTA, WHAT IS THE MAN'S LAST NAME, THE GENTLEMAN, THE INCARCERATION --

MS. LAGATTUTA: MR. AIKEN.

MS. BARBERA: MR. AIKEN.

MS. LAGATTUTA: YOU'RE SAYING SHE SAID SHE KNOWS WHO THE WITNESSES ARE?

MS. BARBERA: NO. I'M SAYING THIS.

MS. LAGATTUTA: OH. OKAY.

MS. BARBERA: I'M SAYING THIS. AND DEFENSE HAS SHARED WITH ME THAT MR. AIKEN WOULD POSSIBLY

BE A WITNESS IN THIS MATTER. AND I KNOW THE FOCUS OF MR. AIKEN'S TESTIMONY. AND I BELIEVE THAT MS. WEIR'S FOCUS UPON WHETHER OR NOT THIS INDIVIDUAL WILL STOP HURTING PEOPLE WOULD TAKE A PRIORITY IN HER MIND OVER WHAT THIS MAN ACTUALLY DID. SHE NEVER INDICATED THAT -- THAT THE FACTS OF THE CASE WERE A PRIMARY FACTOR IN HER MIND.

I'M SORRY. I LOST MY ORDER.

MS. PRICE HAS INDICATED THAT.

THE COURT: WHAT PANEL WAS SHE ON? I'M LOOKING FOR MY NOTES, AND I CAN'T FIND HER.

MS. LAGATTUTA: PRICE IS ON PANEL TWO, JUDGE. I CAN GO BACK AND TELL YOU WHAT PANELS THEY'RE ON. MS. WEIR IS ON PANEL FOUR.

THE COURT: I'VE GOT THE OTHERS. I JUST COULDN'T FIND HER.

MS. LAGATTUTA: SHE IS ON TWO.

MS. BARBERA: AGAIN, MS. PRICE, ALONG THE SAME LINES AS MS. WEIR. SHE WANTS TO KNOW THE REMORSE, THE LACK OF RECIDIVISM. IF THEY ARE QUITE YOUNG, THAT'S ALSO IMPORTANT. SHE SAID SOMETIMES PEOPLE CAN COME BACK OUT AND BE OKAY. DOESN'T BELIEVE IN JUST PUTTING PEOPLE IN THE PRISONS. AND OF COURSE PUTTING PEOPLE IN THE PRISONS IS A MUCH LESS SEVERE PENALTY THAN IMPOSING A DEATH PENALTY. SHE WAS SPECIFICALLY ASKED ABOUT -- UNDER QUESTION NUMBER 83: UNDER WHAT CIRCUMSTANCES DO YOU THINK LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IS APPROPRIATE? IF A PERSON IS HIGHLY UNLIKELY TO COMMIT THE CRIME AGAIN AND IT IS BASED ON HOMICIDE WITHOUT LONGSUFFERING OF THE MURDERED AND IF HE OR SHE HAS

PROVEN TO HAVE LEARNED FROM HIS OR HER MISTAKE. SHE AGAIN FOCUSED ON THAT RISK OF RECIDIVISM IN HER QUESTIONING. AND FOR THAT REASON, AS WITH MS. WEIR, KNOWING OR BELIEVING THAT I KNOW WHAT IS PLANNED IN THE PENALTY PHASE, WE EXERCISED A CHALLENGE AGAINST HER FOR PRIMARILY THAT REASON.

AND FINALLY AS TO MS. JULE, MS. JULE IN PARTICULAR EXPRESSED CONCERN ABOUT THE INTERROGATION TECHNIQUES THAT I WAS DISCUSSING WITH HER. SHE SEEMED VERY CONCERNED THAT SOMETIMES INDIVIDUALS MIGHT CONFESS IF THEY DID NOT DO SO. IN OTHER WORDS, A FALSE CONFESSION. MS. JULE IS EXTREMELY YOUNG. THE RECORD WILL REFLECT THAT SHE IS 25 YEARS OF AGE. SHE ALSO MADE REFERENCE TO THE INDIVIDUAL NEEDING TO BE FOUND ABSOLUTELY GUILTY FIRST IN ORDER FOR THE DEATH PENALTY TO BE AN OPTION. AND HER COMMENTS OVERALL, PARTICULARLY CONCERNING THE INTERROGATION TECHNIQUES -- AND, AS YOUR HONOR IS AWARE, THE DEFENDANT'S STATEMENT IN THIS MATTER IS EXTREMELY RELEVANT TO THE PROSECUTION OF THIS CASE. AND FOR THAT REASON WE CHALLENGED MS. JULE.

THE COURT: I THINK THAT COVERS ALL OF THEM. I SEE YOU'RE FLIPPING THROUGH PAPERS. I THINK YOU HAVE ADDRESSED EACH ONE OF THESE ALREADY.

MS. BARBERA: I DID, YOUR HONOR. I HAVE A FEW MORE THINGS TO SAY BUT I --

THE COURT: OH, NO. GO AHEAD.

MS. BARBERA: -- BELIEVE THE RECORD -- NO. I'M SATISFIED WITH THE RECORD AT THIS TIME. THANK YOU, YOUR HONOR.

MS. LAGATTUTA: YOUR HONOR, AND PART OF OUR

SMITH, HAS BEEN STRUCK.

MS. LAGATTUTA: JUDGE, AT THIS TIME I HAVE TO REURGE MY *BATSON* CHALLENGE. MR. SMITH HAS BEEN THE ONLY BLACK JUROR THAT'S MALE THAT HAS MADE IT TO THE JURY BOX, AND NOW SHE HAS CUT EVERY BLACK MALE THAT HAS MADE IT THROUGH. AND THERE ARE NO BLACK MALES, WHICH IS THE DEFENDANT'S RACE AND GENDER, ON THE JURY. AND THERE IS ONLY ONE POTENTIAL BLACK FEMALE ON THE JURY.

MS. BARBERA: YOUR HONOR, JUST FOR CLARIFICATION PURPOSES, MR. SINGLETON WAS STRUCK BY THE DEFENSE.

MS. LAGATTUTA: RIGHT. WE STRUCK BOTH RACES AND SEX, BUT WE HAVE NOT ELIMINATED ANY ONE GROUP.

MS. BARBERA: I UNDERSTAND THAT. BUT THE REPRESENTATION BY MS. LAGATTUTA WAS THAT I REMOVED EVERY AFRICAN AMERICAN MALE, AND THAT IS UNTRUE.

MS. LAGATTUTA: THE FACT REMAINS THERE ARE NO BLACK MALES ON THE JURY. AND MR. SMITH HAS BEEN ON THE JURY SINCE LAST WEEK. HE WAS THE LAST AFRICAN AMERICAN ON THE POTENTIAL JURY POOL.

THE COURT: DO YOU WANT TO RESPOND OTHER THAN THAT?

MS. BARBERA: NO, SIR.

THE COURT: ALL RIGHT. ONCE AGAIN, IT'S ONE MORE. WE HAVE GONE THROUGH ALL THE OTHER STRIKES, AND I DID NOT FIND A PATTERN. I DON'T FIND ONE NOW, BUT I WILL HAVE HER PROVIDE HER RACE NEUTRAL REASONS FOR STRIKING MR. SMITH.

MS. BARBERA: AND, JUDGE, IT ALL BOILS DOWN TO ONE THING THAT MR. SMITH WROTE ON HIS QUESTIONNAIRE THAT I JUST CANNOT LET GO OF. AND

IT IS: WHAT IS THE BEST REASON NOT TO IMPOSE THE DEATH PENALTY? AND HIS RESPONSE WAS: TO REFORM A PERSON. AND I JUST CANNOT LET GO OF THAT. IT WASN'T ANY MITIGATING CIRCUMSTANCE. IT WAS TO REFORM A PERSON. AND THE DEFENSE WILL BE ARGUING FOR LIFE. THERE WILL BE INDIVIDUALS CALLED TO THE STAND TO TALK ABOUT HOW HE HAS NOT ENGAGED IN ANY -- HAS NOT CAUSED ANY PROBLEMS AT PARISH PRISON, THAT THEY DO NOT BELIEVE HE WILL BE A RISK IF HE IS A LIFER. AND I JUST CAN'T LET GO OF THAT.

MS. LAGATTUTA: JUDGE, MY NOTES ARE FROM WHEN HE TESTIFIED BACK ON THE FIRST DAY, APRIL 13TH AND APRIL 14TH. MR. SMITH IN THE HYPOTHETICAL SAID THAT HE WAS OKAY WITH BOTH -- TO THE JUDGE -- BOTH POTENTIAL SENTENCES. THE DEATH PENALTY WOULD DEPEND ON THE CASE. HE IS ALSO THE VICTIM OF AN ARMED ROBBERY. AND HE DIDN'T TESTIFY. IT WOULDN'T AFFECT HIM TO BE FAIR. MITIGATION, IF HE WERE -- HE WOULD WANT HIM TO BE REMORSEFUL OR UNDER THE INFLUENCE. HE WOULD CONSIDER LIFE. AGE IS IMPORTANT. LACK OF CRIMINAL HISTORY WAS -- HE WOULD CONSIDER. I DON'T THINK -- I'M TRYING TO READ MY LITTLE HANDWRITING HERE. HE COULD RESPECT OTHER PEOPLE'S OPINIONS. HE COULD KEEP AN OPEN MIND REGARDING THE PENALTY WITH THE CASE FACTS. AGREES THAT AGGRAVATING AND MITIGATING CIRCUMSTANCES SHOULD BE CONSIDERED. HE COULD WEIGH IT. HE WOULD PROBABLY VOTE FOR THE DEATH PENALTY UNLESS WE SHOWED IN SOME WAY, SHAPE, OR FORM REMORSE OR REDEMPTION. DEATH PENALTY IS NOT THE ONLY IMPORTANT, BUT HE COULD CONSIDER BOTH.

MS. BARBERA: AND THAT GOES BACK TO THE

PROBLEM, THE REMORSE AND THE REDEMPTION. THE SAME REASON WE CHALLENGED PEOPLE WHO WORK IN THE PRISONS. MR. EFFERSON CAME BACK AND SAID IT WAS A CHALLENGE FOR CAUSE, BUT HE WAS ON MY LIST TO BUMP FOR PRECISELY THAT REASON.

MS. LAGATTUTA: I THINK THAT'S A DIFFERENT SITUATION. MR. EFFERSON HAD A THOROUGH AND CON -- LONG COLLOQUY ON WHAT HE ACTUALLY DOES WORKING WITH LIFERS, AND HE HAS MINISTERED TO PEOPLE ON DEATH ROW. I THINK THAT'S SEPARATE THAN MAYBE HE WANTS PEOPLE TO SHOW REDEMPTION OR REMORSE. REDEMPTION.

THE COURT: ALL RIGHT. I FIND THEY ARE RACE NEUTRAL REASONS WHY THE STATE WOULD STRIKE MR. SMITH. THAT *BATSON* MOTION IS DENIED.

MS. LAGATTUTA: NOTE MY OBJECTION FOR THE RECORD, YOUR HONOR.

OKAY. NOW I'VE LOST TRACK OF HOW MANY WE HAVE.

THE COURT: WHAT IS THAT?

MS. LAGATTUTA: JURORS.

THE COURT: I THINK WE ARE BACK AT 11. WE HAVE BEEN LOSING ONE EVERY TIME AND GETTING A NEW ONE. SO WE NEED TO CONSIDER THE NEXT ONE.

MS. LAGATTUTA: I KEEP FORGETTING TO GO BACK TO THAT ONE.

THE COURT: CHASSAIGNAC.

MS. LAGATTUTA: MR. DAVIS IS ON THE JURY AND MS. SUIRE IS ON THE JURY. IS THAT RIGHT?

THE COURT: AS OF NOW.

MS. LAGATTUTA: OKAY. I CAN'T WRITE A JUROR DOWN BECAUSE THEY MIGHT GET CUT.