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

No. 18-9710

IN THE
SUPREME COURT OF THE UNITED STATES

LEE TURNER, JR., *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

REPLY BRIEF FOR PETITIONER

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I. RESPONDENT MISCHARACTERIZES LOUISIANA'S JURISPRUDENCE TO MASK THE LOUISIANA SUPREME COURT'S CONTINUED, EXPRESS DISREGARD OF THIS COURT'S PRECEDENTS WHEN APPLYING STEP ONE OF *BATSON*

Respondent does not dispute that the application of a categorical rule that statistics alone are insufficient to raise a prima facie case of discrimination under *Batson*, would violate this Court's precedents in *Batson v. Kentucky, Johnson v. California* and *Flowers v. Mississippi.* Respondent claims instead that Louisiana does not have such rule and did not apply it in this case. Respondent's Brief pp. 5, 15-26. However, both contentions are self-evidently contradicted by the Louisiana Supreme Court's opinion below.

Respondent claims that the Louisiana Supreme Court simply found that the statistics were insufficient on the facts this case, and did not discount them pursuant to any categorical rule. Respondent cites the fact that the prosecutor's strike rate against African Americans at the time of the *Batson* challenge was only 50% (6 of 12 qualified African American's struck by the prosecutor). Respondent's Brief pp. 18, 22, 25-26. However, far from finding the statistics uncompelling, the Louisiana Supreme Court recognized that under *Johnson v. California,* they "could support a conclusion that the trial court [] abuse[d] his discretion" in finding no inference of discrimination.[1] App. A. at A34 (citing *Johnson v. California*, 545 U.S. 162, 170 (2005)

[1] To be sure, Respondent's isolated statistic ignores the crucial fact that the prosecutor's use of peremptories to remove 50% of qualified African Americans was vastly disproportionate to its treatment of white potential jurors. At the time the *Batson* objection was made, the prosecutor used 85% of her strikes to remove 50% of qualified African Americans who constituted 39% of the qualified venire, but struck

(defendant need produce only "evidence sufficient to permit the trial judge to draw an inference that discrimination as occurred."). Yet despite this acknowledgement, the Louisiana Supreme Court went on to conclude otherwise, relying on its own contrary jurisprudence and pre-*Johnson* authority from the Eighth Circuit, that forecloses proof based on statistics alone: "[t]his Court has held, *however,* that bare statistics alone are insufficient to show a prima facie case of discrimination." *Id.* (emphasis added) (citing *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)).

The Louisiana Supreme Court's only other consideration was to go on to discount the pattern of strikes completely because the trial court had already concluded that the earlier strikes were nondiscriminatory. It therefore essentially required Petitioner to have met the heavy burden of proving discrimination at step-three before it would consider the pattern involving those prior strikes at step one. This approach is clearly inconsistent with *Johnson*'s "inference of discrimination" standard, and was also squarely rejected in *Flowers v. Mississippi. See, e.g.*, *Flowers v. Mississippi,* 139 S. Ct. 2228 (2019) (*Thomas*, J., dissenting). *See further*, Petitioner's Supplemental Brief, p. 3.

Respondent cites three other Louisiana Supreme Court cases to support its claim that Louisiana has no such rule. Respondent's Brief, pp. 19-20. These likewise fail to convince.

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no (0%) white venire members even though they comprised over half of the venire. Its only other peremptory strike had been used against a member of another minority.

First, Respondent cites language in *State v. Draughn,* a case in which the Louisiana Supreme Court upheld the trial court's finding of no prima facie case where the defendant relied on numbers alone, without any statistical context for those numbers. *See State v. Draughn*, 2005-1825, (La. 1/17/07), 950 So.3d 583, 602 (defendant relied on evidence that the prosecutor struck four black potential jurors but only two whites). As the *Draughn* court reasoned, without information such as the racial makeup of the venire to give the mere numbers any context, there was no meaningful evidence of a racial disparity. Petitioner does not dispute that this reasoning is in line with the numerous Circuit Court decisions cited by Respondent finding "numbers alone" to be insufficient.

However, the question presented to the Court in this case is whether a *statistical* showing can be sufficient to raise a prima facie case, not "mere numbers." Louisiana's categorical rule foreclosing reliance on "bare statistics" is not contained in *Draughn,* but in other cases ignored by Respondent. See, *e.g.*, *State v. Duncan,* 99-2615 La. 10/16/01), 802 So.2d 533, 550 (rejecting claim based on "bare statistics" because a defendant must "come forward with facts, not just numbers alone, when asking the district court to find a prima facie case") (citing *Moore*, 895 F.2d at 485); *State v. Dorsey*, 2010-0216 (La. 09/07/11), 74 So. 3d 603, 617 ("bare statistics are insufficient to support a prima facie case of discrimination") (citing *Duncan*, 802 So.3d at 550). It was this line of cases the Louisiana Supreme Court relied on and applied in Mr. Turner's case, not *Draughn.*

The Respondent cites two cases where statistics were presented in support of a prima facie case and the Louisiana Supreme Court "invoked *Johnson* to warrant remand for a prima facie case determination." Respondent's Brief p. 19-20 (citing *State v. Drake,* 2009-1194 (La. 1/30/09), 2 So.3d 416, 417, *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)). However, these two outlier cases decided over a decade ago—out of thirty three years of post-*Batson* jurisprudence and fourteen years of post-*Johnson* jurisprudence—do not undermine the Louisiana Supreme Court's otherwise clear, express and consistent application of its unconstitutional rule.[2]

Since *Drake,* the Louisiana Supreme Court and appellate courts have applied the rule without exception. *See* Petitioner's Brief p. 24 (citing cases); *see also, e.g., State v. Douglas*, 2014-0450 (La. App. 1 Cir 11/07/14) 2014 La. App. Unpub. LEXIS 646 (citing holding in *Duncan* that "defendant's reliance on bare statistics" is misplaced and finding prosecutor's exclusion of 4 of 5 (80%) African Americans to be

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[2] Neither of the cases is as clear cut as Respondent implies. *Maxwell* was a step-two case on appeal. The trial court found that the defendant demonstrated a prima facie case and allowed the prosecutor to give reasons for one of the strikes, but prevented the prosecutor from giving reasons for the other challenged strikes. *State v. Maxwell,* 08-1007 (La.App. 4 Cir. 8/19/09), 17 So.3d. 505, 509. The court of appeal found that the trial court erred by failing to conduct the proper step two and step three analysis, and reversed the conviction outright. The Louisiana Supreme Court accepted the prior finding of a prima facie case, but the main point of its decision was to reverse the outright reversal and remand the case so that the lower courts could revisit the issue after the prosecutor had the opportunity to explain all of the challenged strikes. In *Drake,* the Louisiana Supreme Court's opinion refers to statistics alone, but the showing on appeal extended beyond mere statistics to include allegations of disparate questioning and the prosecutor's use of back-strikes to manipulate the pattern of strikes. *See State v. Drake,* 2008-9992 (La.App. 1 Cir 05/02/08), 2008 La. App. Unpub. LEXIS 217 at *17, 38-39.

insufficient proof of a prima facie case); *writ denied, State v. Douglas,* 2014-2516 (La. 09/25/15), 178 So. 3d 565; *State v. Mason*, 47642 (La. App. 2 Cir 01/16/13), 109 So. 3d 429, 441 (rejecting prima facie case where prosecutor struck 11 of 12 African Americans, because "[b]are statistics alone are insufficient to support a prima facie case of discrimination"); *writ denied*, *State v. Mason*, 120 So. 3d 279, (La., Sept. 13, 2013). The Louisiana Supreme Court did so in the current case despite expressly acknowledging that doing so was inconsistent with *Johnson.*

II. THE RESPONDENT DOES NOT DISPUTE THAT THE FIFTH CIRCUIT AND LOUISIANA SUPREME COURT'S APPROACH TO COMPARATIVE JUROR ANALYSIS CREATES A SPLIT IN AUTHORITY IN THIS IMPORTANT AREA OF FEDERAL LAW

A. The Respondent Fails to Address Miller-El's Holding That A Reviewing Court May Not Justify The Differential Treatment of Black and White Panelists Based on Reasons Not Proffered by the Prosecutor at Trial.

Respondent does not dispute that the Fifth Circuit's approach in *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) and *Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018), adopted by the Louisiana Supreme Court in this case, creates a split in authority in this important area of federal law governing *Batson's* enforcement. Rather, Respondent claims that an appellate court's effort to scour the record to find any characteristic of a non-stricken white juror which might have made them more favorable to the prosecutor, and thereby discount the evidence of race-based intent inferred from disparate treatment, is not only permissible under *Miller-El*, but required. Respondents Brief, p. 26-27. Respondent invokes *Miller-El's* requirement—reiterated in *Snyder, Foster* and *Flowers*—that a reviewing court consider "all relevant circumstances" at *Batson* stage three. Respondent's Brief, p. 27-28, 36 n.4.

See Miller-El v. Dretke, 545 U.S. 231, 239-40, 252 (2005); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El*); *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (citing *Snyder*); *Flowers*, 139 S.Ct at 2245. It insists that Petitioner's challenge is a "disingenuous attempt" to have an appellate court "ignore large portions of the record," "cherry pick" from the transcript, and improperly limit its comparative juror analysis to "the select details petitioner sought to compare." *See* Respondent's Brief, p. 27, 36 n.4. This mischaracterizes and ignores the clear holding of *Miller-El.*

The "all relevant circumstances" language does not alter the key premise of comparative juror analysis, a tool designed to help assess the credibility of the reasons *given by the prosecutor at trial.* "Relevant" evidence as it relates to this tool is therefore expressly limited by this Court to the reasons the prosecutor actually gave. As Judge Costa explained on behalf of the dissenting justices in *Chamberlin*, the language in *Miller-El* requiring consideration of all relevant evidence at *Batson's* stage three "should not be read to provide an end run around the same opinion's emphatic prohibition on considering new reasons" for a strike. *Miller-El* makes clear that "there is a difference between evidence bearing on the plausibility of the prosecutor's reason, which reviewing courts should consider, and new reasons which they may not." *Chamberlin,* 885 F.3d at 854-55 (Costa, J., dissenting).

Respondent next claims that "asking someone why she struck a particular juror is an entirely different inquiry from asking why she kept another." Respondent's Brief, p. 27. However, this Court has been unequivocal in its application of the "stand or fall" rule for comparative juror analysis, and prohibits consideration of post-hoc

justifications whether framed as new reasons for striking black jurors or new explanations for keeping white ones. As laid out in Petitioner's Brief, it has consistently rejected similar post-hoc efforts to distinguish non-stricken white jurors based on characteristics not addressed in the prosecutor reasons at trial. *See* Petitioners' Brief, p. 31 (citing *Miller-El*, 545 U.S. at 245 n.4; *Snyder* 552 U.S. at 485-86; *Foster*, 136 S.Ct at 1737, 1751). It did so again in *Flowers* despite a rigorous dissent. *See* Petitioner's Supplemental Brief, p. at 4. To be sure, "if a concern about a black juror was important enough to be cited as a reason for the challenged strike, a white juror with the same problematic characteristic should also be on the prosecutor's mind[.]" *Chamberlin,* 885 F.3d at 859 (Costa, J., dissenting). Likewise, if a black juror's lack of a favorable characteristic truly motivated a prosecutor's strike, it is reasonable to expect that they would include that in their reasons when asked to provide their explanation.

By holding the state court to *Miller-El's* standard, the Petitioner is not cherry picking "select details" for the appellate court to compare, but following the law. The *prosecutor*, not Petitioner, determined the scope of comparative juror analysis by the responses she gave at trial—and the appellate court's comparative juror analysis should likewise have been defined by those responses.

B. The Respondent's Remaining Arguments Are Irrelevant to the Question Presented and Factually Inaccurate

Unable to address the holding from *Miller-El,* Respondent argues that the Louisiana Supreme Court's improper approach was necessarily taken *in this case* because Petitioner presented his comparative juror analysis for the first time on

direct appeal so that the trial prosecutor was deprived of the opportunity to defend her strikes against those arguments. Respondent's Brief, p. 27, 29. This argument is irrelevant to the question presented which concerns the state court and Fifth Circuit's disregard of the "stand or fall" rule as defined in *Miller-El*, and the resultant circuit split. It is in essence, another challenge to *Miller-El*, specifically the rule that a juror comparison may be undertaken for the first time on appeal (or in federal habeas) so long as the facts supporting that comparison were presented at trial. *See Miller-El*, 545 U.S. at 241 n.2. However, that argument is foreclosed by *Miller-El*—as Respondent's citations to the *dissenting* opinion in *Miller-El* makes clear. *See also, e.g.*, *Snyder*, 552 U.S. at 483 (relying on comparative juror analysis to find discrimination, even though such comparisons were not made at trial). As noted above, this works no unfairness to a prosecutor, who would have the black panelist's lack of an important favorable characteristic in her mind when explaining her reasons, if it truly factored in the decision.

Respondent's argument is also factually unsound in this case because Petitioner did raise the prosecutor's disparate treatment of similar black and white panelists to the trial court. After the prosecutor repeatedly relied on reform and redemption based reasons to justify its strikes of the black panelists, defense counsel objected that they "have the same answers as the white jurors. But she didn't cut the white jurors, she cut the minorities." Defense counsel specifically identified several similar white panelists accepted by the prosecutor, including Malcolm Jarrell, Peggy

Twyman, and Winter Phelps, all of whom formed part of Petitioner's comparative juror analysis on appeal.[3]

The trial prosecutor had ample opportunity to offer explanations for the disparity, but tellingly did not mention any of the distinguishing factors surmised by the Louisiana Supreme Court on appeal. Instead, when responding to the *Batson* challenge to her strike of juror Michael Smith whose reference to reform at sentencing she "could not let go of," she tried to come up with a white panelist she struck for a similar reason. However, she could not identify a single one. The best she could do was white panelist Mr. Efferson, a juror she in fact challenged for cause based on his opposition to the death penalty. The prosecutor claimed she had planned to peremptorily strike him because he worked in a prison. However, as defense counsel pointed out to the trial court, working with lifers in prison and assisting with their rehabilitation made him very different from the black jurors who simply highlighted the significance of reform or rehabilitation at sentencing; "I think that's separate than maybe he wants people to show redemption or remorse." And unlike the stricken black jurors who the prosecutor failed to question on the topic at all, the prosecutor

[3] Defense counsel also asked the trial court for additional time to review the record and supplement the comparative juror analysis, but that request was denied. Respondent's criticism of Petitioner for failing to raise the *Batson* issues and comparative juror analysis in his Motion for New Trial is equally disingenuous. Not only is that not a procedural requirement for appeal, but the record of voir dire had not been transcribed at the time the Motion for New Trial was litigated, making it impossible for appellate counsel, who litigated the motion for new trial, to have conducted the record-based analysis required. Respondent did not take issue with the timing of the comparative juror arguments on appeal and neither did the Louisiana Supreme Court.

had a "long colloquy" with Mr. Efferson exploring this issue during voir dire, before ultimately striking him for cause.

Even on appeal Respondent did not address the disparities raised by the comparative juror analysis (nor claim that the issue was waived). The purported distinctions were conjured only by the Louisiana Supreme Court in its decision. In some instances the Louisiana Supreme Court did not even identify any specific distinguishing factor it claimed justified its disregard of the comparative juror evidence presented, but simply surmised that some existed. *See* Petitioner's Brief, p. 19-20; App. A at 37 n.24. The ease with which the Louisiana Supreme Court was able to dispense with the comparative juror analysis, demonstrates the extent to which this novel approach, sanctioned by a narrow majority of the Fifth Circuit, and now adopted in Louisiana, undermines the value of this tool which henceforth had provided a critical role in ferreting out discrimination.

In truth, Respondent wishes to avoid the Court's scrutiny of the new approach so that this tool can be co-opted to defeat claims of discrimination rather than prove them. As the dissent in *Chamberlin* pointed out, the only two cases where *Batson* relief was granted by the Fifth Circuit "relied in large part on comparative juror analysis" which would have been discounted under the *Chamberlin* majority's analysis. 885 F.3d at 846 (Costa, J., dissenting) (citing *Hayes v. Thaler*, 361 F. App'x. 563 (5th Cir. 2010); *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009). There is a compelling need for intervention by this Court to correct this subversion of *Miller-El*'s rule.

III. RESPONDENT IGNORES THE PLETHORA OF PROBLEMS WITH THE LOUISIANA SUPREME COURT'S CHARACTERISTICALLY DEFICIENT ANALYSIS OF PETITIONER'S *BATSON* CLAIMS

Respondent has no answer to the plethora of problems with the Louisiana Supreme Court's restrictive interpretation of *Batson,* and for the most part defends the state court's findings by simply reiterating them. Tellingly, Respondent spends little time addressing the prosecutor's purported race neutral reasons, or the myriad indicia of pretext which were systematically recognized but then discounted by the Louisiana Supreme Court.

Respondent does acknowledge the quantitative evidence demonstrating the prosecutor's disparate questioning of black and white panelists about their personal experiences of crime. Respondent attempts to discount this evidence claiming that the disparity is accounted for by defense counsel's questioning which obviated the need for the prosecutor to ask questions of as many white panelists. Respondent's Brief, p. 37. Respondent offers no examples to support that claim, however, which is unsurprising given that the prosecutor always questioned the panelists first and covered the topic *before* defense counsel asked them any questions.

Respondent has no answer at all for the prosecutor's failure to question the any of the stricken panelists about their responses regarding remorse and reform that she professed concern about, nor the prosecutor's repeated mischaracterizations of the stricken panelists' responses, both classic indicia of pretext recognized by this Court.

The weakness of Respondent's response to the compelling reasons Petitioner has presented for granting certiorari is best summed up by Respondent's assertion

claim that: "even in the event a prosecutor's reason could be deemed pretextual . . . the *Batson* third-step inquiry does not end there." Respondent's Brief, p. 35. Yet, when the *only* race-neutral reason proffered by the prosecutor at trial has been "deemed pretextual," as in the case of Michael Smith, it certainly must. That Respondent need resort to such perverse argument to defend the Louisiana Supreme Court's opinion in this case, demonstrates the compelling need for this Court's intervention. Without it, *Batson* will remain an empty promise in Louisiana, absent a prosecutor's express reliance on race at trial.

CONCLUSION

For all the reasons discussed herein as well as in Petitioner's Brief and Petitioner's Supplemental Brief, Mr. Turner respectfully requests that the Court grant his petition for writ of certiorari.

Respectfully submitted

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