No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH L. BERRY, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS,
TENTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does discrimination in jury selection at the intersection of race and gender violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES AND ORDERS:

OTHER AUTHORITIES:

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Petitioner Joseph Berry respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio for the Tenth Appellate District.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

LIST OF PROCEEDINGS

State v. Joseph L. Berry, 2019-1558, Supreme Court of Ohio, Judgment entered April 17, 2020.

State v. Joseph L. Berry, No. 18 AP 9, Court of Appeals of Ohio for the Tenth Appellate District. Judgment entered September 26, 2019.

State v. Joseph L. Berry, No. 15 CR 5882, Court of Common Pleas for Franklin County, Ohio. Judgment entered December 5, 2017.

OPINIONS BELOW

The Supreme Court of Ohio declined to accept jurisdiction in this case on February 4, 2020. Undersigned counsel filed a motion for reconsideration, and the Supreme Court of Ohio again declined to accept jurisdiction on April 14, 2020. The opinion of the Court of Appeals of Ohio for the Tenth Appellate District in docket number 18 AP 9 was issued on September 26, 2019. It is not published. *State v. Joseph L. Berry*, 2019-Ohio-3902. The judgment entry of the Court of Common Pleas for Franklin County, Ohio, was entered December 5, 2017, and it is not published.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio declined to accept Mr. Berry's motion for reconsideration on April 14, 2020. The order is reproduced in the Appendix, attached hereto at App. 19a. On March 19, 2020, this Court ordered "that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." U.S. Sup. Ct. R. Filing Extensions. Mr. Berry now timely files this petition within 150 days of the date on which the Supreme Court of Ohio declined to accept his motion for reconsideration. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Marshaun Gray died of a single gunshot to the back of his head at a Columbus, Ohio, nightclub in the early morning hours of October 12, 2008. *App. 3a.*

Seven years lapsed before Mr. Berry was charged. *Id.* On December 1, 2015, Mr. Berry was indicted for aggravated murder, in violation of Ohio Revised Code § 2903.01(A), and murder, in violation of Ohio Revised Code § 2903.02(A), both with firearm specifications under Ohio Revised Code § 2941.145(A). *Id.*

After the trial court denied defense counsel's motions to suppress the State's primary witness's in and out of court identifications, the case proceeded to trial. *App. 4a.*

During voir dire, the State of Ohio used two of its peremptory strikes to dismiss black prospective jurors. *App. 8a.* After the State used its second strike to dismiss Prospective Juror Lawson, the only black man on the panel, defense counsel raised a challenge under this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* The State asserted that there was no pattern of strikes against black jurors, but the trial court asked the State to explain Mr. Lawson's removal. *Id.* The State asserted, without any additional explanation, that Mr. Lawson was removed from the jury because of his answers during voir dire in Mr. Berry's case and during voir dire for a *different* trial in a *different* courtroom, which the trial court was not present for. *Id.* Defense counsel pointed to a number of flaws in the State's arguments, specifically noting that it was impossible to prove a pattern when there was only one black man on the panel. *Id.*

Despite Mr. Lawson being the only venireperson who looked like Mr. Berry and despite not knowing the content of Mr. Lawson's out-of-court statements, the trial court overruled the challenge and permitted Mr. Lawson's dismissal from the jury:

> I don't see a problem at this point in time. They are making their objection. They are making their record and we'll see where it goes. You know, it's not like we don't have -- there is a shortage of jurors in there, though. And just because he picked one doesn't necessarily mean that we have the issue.

Id. The State went on to exercise its final peremptory strike to remove Prospective Juror Scott, who would have served as an alternate juror. *Id.* After the only alternate juror was sworn in, the trial court asked whether defense counsel wished to renew the *Batson* challenge as to Ms. Scott. Defense counsel responded in the affirmative and the trial court ruled on the matter: "Okay. I don't see the pattern. I understand why, so I don't think he's impinged upon your client. Plus, she's the second alternate in the line anyway. But you both had me nervous I would have no alternates." *Id.* With that, voir dire concluded. *Id*.

The State presented the testimony of eight witnesses during Mr. Berry's trial. *App. 4a.* Mr. Berry was eventually convicted on all counts and sentenced to life without the possibility of parole for aggravated murder plus a mandatory consecutive three years of incarceration for a firearm specification. *App. 5a, 6a.*

Mr. Berry filed a timely notice of appeal. *App. 6a.* On appeal, Mr. Berry asserted that the State of Ohio failed to meet its burden at the second step of the *Batson* analysis because its reasons for dismissing Mr. Lawson were not sufficiently clear and the court failed to meet its burden at the third step of the analysis because the unclear, non-specific reasons proffered by the State were pretext for discrimination. *Id.* Additionally, Mr. Berry asserted that whether a prima facie case existed was a moot issue because the State offered its explanation for the peremptory challenge and the trial court made a final ruling on the matter. *App. 8a.*

The Ohio Court of Appeals for the Tenth Appellate District disagreed, finding that the trial court did not, in fact, rule on the ultimate question of intentional

discrimination. *App. 9a.* Instead, the court "construe[d] the transcript of the voir dire proceedings to indicate the trial court's determination that Berry failed to establish a prima facie case of discrimination as to the removal of potential juror Lawson and alternate juror Scott." *Id.* While Mr. Berry asserted below that he had established a prima facie case because the State dismissed the only person who looked like him and shared both protected characteristics with Mr. Berry, the court of appeals concluded that was insufficient to raise an inference of discrimination:

> In objecting to the peremptory challenges at trial, Berry's only reason given was that Lawson was 'the only male black juror that just got excused.' But that reason did not address the presence of African-American females, and there is no indication in the record as to whether these individuals were the only two African-Americans in the venire.

Id. (internal citation omitted). The court of appeals discounted Mr. Berry's argument that removal of the only person who looked like him was sufficient to satisfy the minimal burden at the first step of the *Batson* analysis. The court went on in its decision to uphold Mr. Berry's convictions. *App. 14a.*

On November 13, 2019, Mr. Berry filed a notice of appeal to the Supreme Court of Ohio. In his appeal, he raised four propositions of law:

(1) The wholesale exclusion of venirepersons who share the same protected characteristics as the defendant gives rise to a mandatory inference of discrimination.

(2) The trial court's decision to excuse an African American juror after a *Batson* challenge is clearly erroneous when it fails to conduct the necessary *Batson*

analysis and instead relies on impermissible factors without examining all of the relevant evidence.

(3) An eyewitness identification that can be made only after police intervention is not the product of genuine memory and is both impermissibly suggestive and unreliable.

(4) The intentionality of suggestive state action is irrelevant to the Due Process analysis under *Manson v. Braithwaite*, 432 U.S. 98 (1977).

On February 4, 2020, the Supreme Court of Ohio denied Mr. Berry's appeal, with Justices Patrick F. Fischer and Melody J. Stewart dissenting and indicating they would have accepted the appeal on the first proposition of law. *App. 18a.* On February 13, 2020, Mr. Berry filed a motion for reconsideration with the Supreme Court of Ohio. The Court denied that motion on April 14, 2020. *App. 19a.*

REASONS FOR GRANTING THE PETITION

I. Introduction

A jury selected without the taint of discrimination is a basic constitutional guarantee that defines the framework of every criminal trial, without exception. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)) (the government "denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."). This Court has expressed deep concern that litigants could remove jurors on the basis of unfounded assumptions and stereotypes, believing black jurors will be more sympathetic to black defendants and female jurors will be overly influenced by their identity as women. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S.

127, 142 (1994) (quoting *Strauder* at 308) ("Striking individual jurors on the assumption that they hold particular views simply because their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority"); *Flowers v. Mississippi*, --- U.S. ----, 139 S.Ct. 2228, 2241-2242 (2019). For that reason, this Court has consistently and repeatedly reinforced its mandate that peremptory strikes not be used to discriminate on the basis of race or gender.

Mr. Berry – a black man – challenged the State of Ohio's removal of the only person who shared both of his protected characteristics, the only black man on the panel. The Ohio Court of Appeals for the Tenth Appellate District held that these circumstances were insufficient to raise an inference of discrimination under the first prong of the *Batson* test because Mr. Berry did not address whether black women remained on the jury. This Court should grant Mr. Berry's petition for a writ of certiorari because, as many courts around the country have recognized, discrimination in jury selection is far more complicated than striking a male prospective juror because he is a man or a black prospective juror because of his or her race.

II. Life experience and identity are formed at the intersection of race and gender.

The Ohio Court of Appeals for the Tenth Appellate District rejected Mr. Berry's argument that removal of the only person who looked like him was sufficient to satisfy the minimal burden at the first step of the *Batson* analysis. The court was searching for broader trends in the exercise of peremptory challenges against all black individuals across the entire venire and did not consider the significant

commonalities between Mr. Berry and Mr. Lawson. This approach discounted the difference in life experience and the discrimination someone might suffer on account of both their race and their gender, as compared to just their race or just their gender, and is contrary to the majority of jurisdictions that have considered this issue.

Batson, *J.E.B.*, and their progeny reflect a deep concern that jurors will be removed because of assumptions about their biases toward defendants who share their race or sex. Equally disconcerting, prosecutors could remove jurors based on the combination of both protected characteristics. "It would seem anomalous and inconsistent with the primary end of ensuring an impartial jury and a fair trial to conclude that the protections [courts] afford to groups defined by race *or* gender against impermissible exclusion from jury panels ought not extend to groups defined by race *and* gender." *Commonwealth v. Jordan*, 785 N.E.2d 368, 380 (Mass. 2003). *See also Commonwealth v. Issa*, 992 N.E.2d 336, 345 (Mass. 2013).

We see and experience the world at the intersection of the multiple cognizable groups we belong to. A black man sees and experiences the world differently from a white man and a black woman. *See Jamison v. McClendon*, --- F.Supp.3d ----, 2020 WL 4497723, at *1-2 (S.D. Miss. Aug. 4, 2020) (summarizing highly publicized cases of discrimination experienced by mostly black men at the hands of the police); *Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir. 1996) ("Cases, newspaper reports, books, and scholarly writings all make clear that the experience of being stopped by the police is a much more common one for black men than it is for white men."); Yolanda Young, *Teacher's implicit bias against black students starts in*

preschool, study finds, GUARDIAN (Oct. 4, 2016), https://www.theguardian.com/world/2016/oct/04/black-students-teachers-implicit-racial-bias-preschool-study (last visited Sept. 9, 2020) (noting that "preschool teachers 'show a tendency to more closely observe black students, and especially boys, when challenging behaviors are expected.'"). One need only open a newspaper to understand how a person's life experiences, identity, and the discrimination they face are influenced by the intersection of both heir race *and* their gender.[1] And it is foolish to assume that a litigant who discriminates on the basis of race or gender does not discriminate on the basis of the combination of both of those protected characteristics, or that we should be any less concerned about that form of discrimination.

[1] *See, e.g.*, Reis Thebault & Teo Armus, *Dueling narratives fuel opposing views of Kenosha protest shooting*, WASH. POST, (Aug. 30, 2020), https://www.washingtonpost.com/nation/2020/08/30/kenosha-shooting-victims-defense/ (last visited Sept. 9, 2020); Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (June 14, 2020), https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html (last visited Sept. 9, 2020); German Lopez, *Study: people see black men as larger and more threatening than similarly sized white men*, VOX (Mar. 17, 2017), https://www.vox.com/identities/2017/3/17/14945576/black-white-bodies-size-threat-study (last visited Sept. 9, 2020) ("Consider the 2014 Cleveland police shooting of 12-year-old Tamir Rice: After he was killed, the officers involved reported that they thought Rice was 20. While it's impossible to get into these cops' heads to see what they were thinking, it's possible they genuinely believed Rice was older because they saw Rice as bigger than he really was."); Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES (July 20, 2009), https://www.nytimes.com/2009/07/21/us/21gates.html (last visited Sept. 9, 2020) (A white female caller contacted the police after seeing two black men on the porch of a home that happened to belong to one of the two men – Professor Henry Louis Gates, Jr. She reported that she was suspicious after seeing one of the men "'wedging his shoulder into the door as if he was trying to force entry.'").

III. The opinion of the Ohio Court of Appeals decided an important federal question in a way that conflicts with the decisions of a number of federal and state courts.

Whether discrimination in jury selection at the intersection of race and gender violates the Equal Protection Clause of the Fourteenth Amendment is an unsettled question that has engendered disagreement between state and federal courts across the country. Having taken a position in this conflict, the Ohio Court of Appeals for the Tenth Appellate District "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b).

To deny a litigant the opportunity to prove discrimination on the basis of the combination of race and gender is to permit very real discrimination. *See, e.g.*, *Shazor v. Professional Transit Management, Ltd.*, 744 F.3d 948, 958 (6th Cir. 2014) (black female plaintiff satisfied burden at step one of the Title VII analysis by alleging she was discriminated against because of her race *and* gender); *Mosley v. Alabama Unified Judicial System*, 562 F.App'x 862, 866 (11th Cir. 2014) (recognizing black women as a distinct protected subgroup under Title VII); *Lam v. University of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (Emphasis sic.) ("[W]hen a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors"); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (holding that a claim of discrimination based on both race and gender is cognizable under Title VII); *Jefferies v. Harris County Community Action Assn.*, 615 F.2d 1025, 1032 (5th Cir. 1980) ("We agree that

discrimination against black females can exist even in the absence of discrimination against black men or white women.").

While not every jurisdiction has considered the question whether a *Batson* violation can occur at the intersection of these two protected characteristics, those that have are split on the answer. *See, e.g.*, *Ross v. State*, 16 So.3d 47, 59 (Miss. Ct. App. 2009) ("[T]he United States Supreme Court has not addressed this issue of whether combined race-gender groups are cognizable under *Batson*, but we do find that it is a developing and divisive issue in the state courts.").

On the one hand, in contrast to the Ohio court of appeals, the vast majority of state courts to consider the issue have recognized the unique discrimination that can be and frequently is experienced at the intersection of these two protected characteristics. For example, in *Robinson v. United States*, 878 A.2d 1273 (D.C. Ct. App. 2005), the District of Columbia Court of Appeals addressed the issue of whether "black females" can constitute a cognizable group for purposes of a *Batson* challenge. In *Robinson*, the government used six of its ten peremptory strikes to remove all six Black women on the venire, raising a *Batson* challenge from the defense. The trial court determined that "'black females' are not a 'suspect category' for equal protection purposes." *Id*. at 1284. The District of Columbia Court of Appeals reversed, concluding that discrimination against black female jurors, like discrimination against black jurors and discrimination against female jurors, is impermissible under the Equal Protection Clause and is prohibited by *Batson* and its progeny. *Id*. ("If it is

impermissible to exclude jurors because of their race *or* their gender, it is impermissible to exclude jurors because of their race *and* their gender.").

The vast majority of state courts agree. *See*, e.g., *United Rentals North America, Inc. v. Evans*, --- S.W.3d ---, 2020 WL 4783190, at *21 (Tx. Ct. App. Aug. 18, 2020) (recognizing non-black men as a cognizable group); *State v. Harris*, 217 So.3d 255 (La. 2016) (recognizing "white women" as a cognizable group); *State v. Barela*, No. 32,506, 2013 WL 1279111 (N.M. Mar. 28, 2013) (conducting *Batson* analysis in terms of white female jurors); *People v. Watson*, 31 N.Y.S.3d 478, 483 (N.Y. App. Div. 2016) (a New York court of appeals held that "[t]he wholesale exclusion of black men from the jury gives rise to a mandatory inference of discrimination at the first step of the *Batson* inquiry"); *Jeter v. State*, 888 N.E.2d 1257 (Ind. 2008) (sustained trial court's finding of *Batson* violation where peremptory strikes were used against white male jurors); *People v. Jerome*, 828 N.Y.S.2d 78 (N.Y. App. Div. 2006) (holding that the trial court erred by not recognizing black females as a cognizable group); *Commonwealth v. Jordan*, 785 N.E.2d 368 (Mass. 2003) (affirming lower court decision that specifically recognized discrimination in jury selection against white males); *Drake v. State*, 800 So.2d 508, 515 (Miss. 2001) ("Ten of the eleven peremptory strikes used by Drake were exercised against white male veniremen. Such a circumstance creates an inference of purposeful discrimination."); *State v. Shepherd*, 989 P.2d 503, 511 n.4 (Utah Ct. App. 1999) (although the defendant failed to establish a prima facie case, the court concluded that white males are a "protected, cognizable group"); *People v. Garcia*, 636 N.Y.S.2d 370, 372 (N.Y. App. Div. 1995) ("To accept the

trial court's ruling would mean that black females are subject to challenge merely because they are black females and, therefore, without protection of their right to participate in the administration of justice. Such a proposition is clearly violative of equal protection rights."); *People v. Motton*, 704 P.2d 176, 183 (Cal. 1985) (pre-*Batson* decision concluding "[t]he challenged group, whether defined as Blacks generally or Black women, is a cognizable group.").

On the other hand, the United States Courts of Appeals for the Fourth, Ninth, and Eleventh Circuits have each addressed the issue in some respect and came out differently. In *United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986), the Eleventh Circuit declined to treat race-gender groups as cognizable groups for *Batson* purposes. However, the court more recently recognized that this holding and others were likely "greatly influenced by the fact that gender was not considered a discrete classification" at the time the cases were decided. *United States v. Walker*, 490 F.3d 1282, 1291 n. 10 (11th Cir. 2007). The court went on to suggest reexamination of the issue is warranted in light of this Court's *J.E.B.* decision but declined to do so in that case. *Id*. More recently, the Eleven Circuit again declined to endorse "a hyphenated category of protected status under *Batson* that could be created by combining into sub-sets the potential groupings of race and gender in a particular jury venire" and instead considered whether *Batson* was violated through "strikes of whites (whatever their gender) or [] strikes of males (whatever their race)[.]" *See Virciglio v. Work Train Staffing LLC*, 674 F.App'x 879, 886 n.5 (11th Cir. 2016).

The United States Court of Appeals for the Fourth Circuit took a similar approach in *United States v. Thompson*, 443 F.App'x 770 (4th Cir. 2011). In that case, the government sought to use a peremptory challenge to strike a black male juror from the venire. When the defendant raised the challenge on the basis of the prospective juror's combined race and gender, the court reframed the issue as one solely on the basis of race, concluding that the defendant failed to establish a prima facie case that the juror was removed "on the basis of race." *Id*. at 772.

And in *Turner v. Marshall*, the United States Court of Appeals for the Ninth Circuit explicitly rejected consideration of "black males" as a cognizable group for *Batson* purposes. 63 F.3d 807 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999). The court acknowledged "the issue of whether African-American men could constitute a *Batson* class likely is worthy of consideration in light of [*J.E.B.*]," but declined to address the issue in that federal habeas corpus proceeding. *Id*. at 812. *See also Cooperwood v. Cambra*, 245 F.3d 1042, 1046 (9th Cir. 2001) (declining to find black males constitute a cognizable group for *Batson* challenge); *Young v. Gipson*, 163 F.Supp.3d 647, 672 (N.D. Cal. 2015) (noting that "while *Batson* prohibits discrimination based on race or gender, neither the Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males,' may establish a cognizable group for *Batson* purposes.").

There are now at least two approaches reflected in the decisions of the United States courts of appeals and state appellate courts for answering the question raised

in Mr. Berry's appeal. Only the rule adopted by the majority of state appellate courts and contemplated by some of the federal courts of appeals adequately considers how discrimination can manifest in the courtroom. Due to these disparate approaches, whether a defendant and the prospective jurors who appear for jury duty are protected from that discrimination depends entirely on the jurisdiction in which they reside. Further review by this Court is appropriate in order to settle the issue nationally and create a standard that applies equally to criminal defendants and prospective jurors in all cases.

CONCLUSION

At a time in our nation's history when the disparity in experience at the confluence of race and gender is so stark, this Court should grant Mr. Berry's petition for a writ of certiorari to consider whether removal of prospective jurors on those combined bases violates the Equal Protection Clause of the United States Constitution.

Respectfully Submitted,

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