No. _____

OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WALKER, Petitioner,

v.

WILLIAM GITTERE, et al., Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(Capital Case)

In this capital case involving a black defendant and a white victim, the prosecutor struck an African American prospective juror following a voir dire examination during which it posed that same juror a "reverse race question:"

> Do you find that because you're an African-American male that you—you may have some ridicule coming to you from your—from your associates, other African-Americans, that you voted to put another African-American on death row?

Pet. App. at 80. The prosecutor subsequently provided three "race-neutral" reasons for its peremptory strike. The trial court denied the defendant's claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), but failed to address *Batson's* third step: whether the proffered reasons were a pretext for intentional race-based discrimination. Instead, the trial court concluded: "I picked up myself. . . on some things that [the juror] said, which, . . . if I were prosecuting the case[,] might make me concerned so . . . I'm going to deny it, *Batson*." Pet. App. at 65 (pg. 236). On direct appeal and during state post-conviction proceedings, the Nevada Supreme Court denied Mr. Walker's *Batson* claim but did not address the trial court's failure to comply with *Batson*. Further—like the trial court—the Nevada Supreme Court circumvented the *Batson* framework and denied relief based on its unsupported conclusion the State's question "was not grounded in racial discrimination." Pet. App. at 9.

The question presented is:

1. Did the Nevada courts err in failing to observe and follow the three step *Batson* framework and failing to recognize the prosecutor's blatant discriminatory actions in the extraordinary circumstances of this death penalty case?

LIST OF PARTIES

Petitioner James Walker is an inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada.

LIST OF RELATED PROCEEDINGS

State v. Walker, District Court, Clark County, Nevada, Case No. C196420, Judgment of Conviction (May 18, 2007)

Walker v. State, Supreme Court of the State of Nevada, Case No. 49507, Order of Affirmance (367 P.3d. 831 (March 3, 2010))

Walker v. State, Supreme Court of the United States, Case No. 10-6010, Opinion (562 U.S. 1066 (November 29, 2010))

State v. Walker, District Court, Clark County, Nevada, Case No. C196420, Findings of Fact, Conclusions of Law and Order Denying Petition for Writ of Habeas Corpus (December 19, 2017)

Walker v. State, Supreme Court of the State of Nevada, Case No. 62838, Order of Affirmance (2014 WL 6693849 (November 25, 2014))

State v. Walker, District Court, Clark County, Nevada, Case No. C196420, Findings of Fact, Conclusions of Law and Order Denying Petition for Writ of Habeas Corpus (Post-Conviction), Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Leave to Conduct Discovery and Motion for Evidentiary Hearing (December 19, 2017)

Walker v. Nevada, Supreme Court of the State of Nevada, Case No. 75013, Order of Affirmance (465 P.3d 217 (June 19, 2020))

Walker v. Baker, United States District Court Case No. 2:15-cv-01240-RFB-EJY

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PETITION FOR WRIT OF CERTIORARI

Petitioner James Walker requests this Court grant his petition for writ of certiorari and vacate the judgment of the Nevada Supreme Court in this capital case involving extreme and unusual factual circumstances that required the disallowance of the State's racially motivated peremptory strike of an African American juror.

During voir dire, the prosecutor singled out Edward Henderson—the sole African American in the first panel of prospective jurors—by subjecting him to a prolonged examination, well in excess to that of non-African American venire members, and then posing the following question:

> Do you find that because you're an African-American male that you—you may have some ridicule coming to you from your—from your associates, other African-Americans, that you voted to put another African-American on death row?

Pet. App. at 80. The prosecutor ultimately exercised a peremptory strike to preclude Henderson from serving as a juror.

The trial and appellate state courts repeatedly misapplied *Batson* and flouted its three-step framework when reviewing Mr. Walker's challenge to the racially motivated strike. The trial court bypassed *Batson's* third step by—rather than assessing whether the prosecutor's race-neutral reasons were pretextual—relying upon its own observations and appraisement of Henderson's voir dire. Pet. App. at 65. The Nevada Supreme Court failed to correct the trial court's circumvention of

Batson. In addition, the Nevada Supreme Court conducted a likewise improper and distorted review by citing *Batson* and concluding:

> Considering the context of the prosecutor's question, we conclude that it was not grounded in racial discrimination, thereby invoking *Batson*, but rather was designed to expose bias.

Pet. App. at 42. The Nevada State Court's indecipherable ruling ignored the trial court's unconstitutional methodology. Further, the ruling cited to the prosecutor's question, but failed to address whether the prosecutor's peremptory strike was discriminatory. At best, the state appellate court impermissibly reassessed step one of *Batson*, which was rendered moot by the State proffering race neutral reasons. At worst, the state appellate court circumvented *Batson* entirely. To the present date—more than thirteen years since Mr. Walker's conviction—the state courts have failed to conduct a constitutional review of Henderson's peremptory strike.

Mr. Walker requests that this Court grant his petition for writ of certiorari to correct this fundamental miscarriage of justice.

OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming the denial of Mr. Walker's second state post-conviction petition for writ of habeas corpus can be found at *Walker v. State*, 465 P.3d 217 (Nev. 2020). Pet. App. at 1. The Nevada Supreme Court's 2010 opinion affirming the judgment of conviction is reported at *Walker v. State*, No. 49507, 2010 Nev. Unpub. LEXIS 275 (Nev. Mar. 3, 2010). Pet. App. at 40.

JURISDICTION

The Nevada Supreme Court's order of affirmance was issued on June 19, 2020. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a) because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner James Walker was convicted of first-degree murder with use of a deadly weapon, attempt murder with use of a deadly weapon, conspiracy to commit robbery, two counts of robbery with use of a deadly weapon, burglary, and larceny from the person. Mr. Walker was sentenced to death.

I. Relevant facts adduced in the trial proceedings: The trial court's failure to observe *Batson's* constitutionally mandated framework when ruling on Mr. Walker's challenge to the State's racially motivated peremptory strike

During voir dire at Mr. Walker's trial, State prosecutor William ("Bill") Kephart posed the following question to prospective juror Edward Henderson, the only African American on the first jury panel:

> **MR. KEPHART**: Okay. I'm going to ask you something in the end and hopefully you don't take this wrong, but I feel it's very important, is that throughout the questionnaire it—it's pretty obvious that—that—that the questions were basically telling you that we're dealing with two African-

> Americans here, one African-American in—in the questionnaire.
>
> And you, so far, in the jury panel have been the first African-American that we've been able to talk to. And I—my concern is that in the event that your (sic) chosen as a juror and you find the defendant, Mr. Walker guilty of first-degree murder, we are going to be asking that you sentence him to death and we're going to present evidence to support that.
>
> Do you find that because you're an African-American male that you—you may have some ridicule coming to you from your—from your associates, other African-Americans, that you voted to put another African-American on death row?

Pet. App. at 79-80. Counsel for Mr. Walker objected. *Id.* at 80. Instead of ruling on Mr. Walker's objection, the trial court compounded the error by posing its own improper race-based question to prospective juror Henderson:

> THE COURT: But would [you?] feel in anyway constrained, by virtue of your family members or your friends or anything like that, to vote for the death penalty if you felt, after you've heard all of the evidence in this case, the guilty phase, and—assuming it gets to that in the penalty phase, if you felt that that was the appropriate sentence, would you feel in anyway hindered about rendering a sentence knowing that Mr. Walker is an African-American?
>
> PROSPECTIVE JUROR BADGE NO. 018: For me, race would have nothing to do with it, but again I'm not sure if I were on the jury, if I could take someone's life.

Id. at 80-81.

The State subsequently exercised a peremptory challenge to remove Henderson from Mr. Walker's jury. Pet. App. at 58 (pg. 162). Mr. Walker objected to the challenge and an unrecorded bench conference followed. *Id.* Back on the record, Mr. Walker's counsel renewed his objection, arguing the State had "singled out" Henderson by "invit[ing] the defense to [examine him] first[,]" had questioned Henderson "three times as long as any other prospective jury person[,]" and "clearly

asked inappropriate questions . . . ." Pet. App. at 60 (pgs. 218–19). Defense counsel clarified that, in addition to a motion for a mistrial, he was raising a *Batson* challenge. Pet. App. at 61 (pg. 222).

As detailed below, prosecutor Chris Owens conceded the State asked Henderson a race-related question but defended it on the basis that Mr. Walker's counsel had also asked race-based questions:

> **MR. OWENS**: A lot of questions were asked by the Defense about the issue of race as well as by the State by those that had made some comments or where that came up in the case. It was a frequent question.
>
> A question asked by Mr. Kephart was a question of race. It's kind of like a reverse race question, but I haven't heard law or things that say you can't ask, would you favor blacks or would you, you know, be prejudiced against blacks. It also seems to be a fair question.
>
> At the bench a little while ago, there was a comment made by Defense Attorney Ms. Jackson saying that question wasn't asked of anyone else, but there wasn't anyone else of the same race as the defendants in this case where that question would have made any sense.
> And so I haven't seen anything that would indicate that certainly no law saying that that's an inappropriate question. And I don't remember any specific objection on that grounds, just sort of a generic, I'm offended by it.
> Unless we've fallen into some kind of politically correct black hole here, it just seems tit-for-tat; it seems to be in the range of questions that were being asked of any of the jurors.

Id. (pgs. 223–24). The trial court denied the motion for mistrial, noting it thought the State's question was "valid." Pet. App. at 63 (pg. 228).

> **TRIAL COURT**: I mean, to me, I think that, you know, to sentence someone to death is a big deal and there's lots of issues relating to race. It's been studied that there's a disparate impact on African-American's in this society, and I think people are cognizant of that. And I think that's something that is appropriate to inquire about if a potential juror is going to burdened (sic) by that or reluctant about that.

> And so that's kind of what I interpreted Mr. Kephart's question as being relevant too [sic]. So that's denied.

Defense counsel renewed the *Batson* objection, Pet. App. at 64 (pg. 232), and the prosecutor proffered three purportedly race-neutral reasons for its peremptory strike; Henderson: (1) had brothers and sisters who had been incarcerated; (2) was angry because his nephew's murder had not been investigated, and had assumed it was due to his nephew's gang affiliation; and (3) was not sure he could vote for the death penalty. Pet. App. at 65 (pg. 234). In response, defense counsel made a comparative juror argument that there was a man on the panel whose brother had burned down a house, *Id.* (pg. 235), and who had not been removed from the final jury and noted that Henderson had not displayed anger. *Id.* (pg. 235).

The trial court agreed that Henderson had not displayed anger, although he had used a descriptive word of being angry or disappointed. *Id.* (pgs. 235–36). The trial court did not address whether the State's race-neutral reasons were pretextual. Instead, the court skipped *Batson's* third step entirely and denied defense counsel's challenge, noting:

> All right. Well, I mean, I think, you know, I picked up myself on some things that he said, which, you know, if I were prosecuting the case might make me concerned so, you know, I'm going to deny it, *Batson*.

Id. (pg. 236).

II. The Nevada Supreme Court failed to address the trial court's misapplication of *Batson* and then contravened this Court's constitutionally mandated framework

Mr. Walker raised his *Batson* claim on direct appeal. The Nevada Supreme Court denied the claim, merely noting the prosecutor's question to Henderson "was not grounded in racial discrimination, thereby invoking *Batson*, but rather was designed to expose bias." Pet. App. at 42. The state appellate court failed to address the trial court's methodology and the State's peremptory strike, despite invoking *Batson*.

Mr. Walker raised his *Batson* claim once more in his second state post-conviction petition, providing additional evidence of the State's discriminatory intent.[1] Specifically, Mr. Walker provided new evidence revealing the Clark County District Attorney's Office (CCDA) had engaged in a systematic pattern of discrimination during jury selection. *Walker v. Gittere*, Nevada Supreme Court Case No. 75013, Appellant's Appendix, Filed September 28, 2018, Vol. 34 App. at 8368-8370 (hereinafter, "NSC App."). In addition, Mr. Walker provided jury questionnaires and described jury-selection testimony by non-African American venire members who the State elected not to peremptorily strike and who, in some cases, served as seated jurors or alternates. NSC App. Vol. 16 at 3910-3914. These additional materials further demonstrate the State's discriminatory intent in

[1] Mr. Walker filed a timely first state post-conviction petition that was denied by the habeas court, and the denial was affirmed by the Nevada Supreme Court. That proceeding does not raise any issues that are relevant to Mr. Walker's *Batson* claim.

striking Henderson. The Nevada Supreme Court once more denied relief, reiterating its finding during direct appeal proceedings that the prosecutor's question to Henderson was "not grounded in racial discrimination." Pet. App. at 9.

REASONS FOR GRANTING THE PETITION

I. The state courts repeatedly and egregiously circumvented the directives announced by this Court in *Batson* and failed to conduct a constitutional review of the State's manifestly discriminatory peremptory strike

The State posed a question to prospective juror Henderson that was laden with offensive, race-based insinuations and typecasts and then exercised a peremptory strike to prevent him from serving on Mr. Walker's jury. Pet. App. at 79-80. The peremptory strike should have been disallowed following a review compliant with *Batson's* three-step, constitutionally mandated, framework. The State admitted it had posed a "reverse race question" that sought to ascertain whether juror Henderson would "favor blacks . . . ." Pet. App. at 74-75. The trial court, however, failed to assess the race-neutral reasons proffered by the State, placed itself in the shoes of the prosecutor, and relied on its own unarticulated reasons for excluding Henderson from Mr. Walker's jury. Pet. App. at 65 (pg. 237).

The trial court abdicated its role as a neutral arbiter when it flouted the *Batson* framework and instead engaged in the type of activist guesswork this Court has repeatedly and forcefully rejected. *See*, *e.g.*, *Johnson v. California*, 545 U.S. 162, 172 (2005) (internal quotation marks and alterations omitted) ("The *Batson* framework is designed to produce actual answers [from a prosecutor] to suspicions and inferences that discrimination may have infected the jury selection process. . . .

It does not matter that the prosecutor might have had good reasons; what matters is the real reason [jurors] were stricken."). The Nevada Supreme Court, in turn, failed to hold the trial court to account for failing to follow a constitutional review and instead twice undertook its own egregious misapplication of *Batson*.

This Court will review a capital habeas case arising from a state court judgment when the "lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). Here, review is warranted to correct the trial and appellate courts' egregious circumvention of *Batson's* three-step inquiry. Review is further warranted on account of the abhorrent racial discrimination exhibited by the prosecutors in this case.

II. This Court has jurisdiction to review the judgment of the Nevada Supreme Court denying Mr. Walker post-conviction relief on his *Batson* claim

"When application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1740 (2016) (citing *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). Here, the Nevada Supreme Court "did not invoke any state-law grounds 'independent of the merits of [Mr. Walker's] federal constitutional challenge,'" and thus this Court has "jurisdiction to review its resolution of federal law." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (citing *Foster*, 136 S. Ct. at 1737).

The Nevada Supreme Court reasoned that its rejection of Mr. Walker's *Batson* claim on direct appeal constituted the law of the case. The decision further

noted post-conviction counsel was not ineffective for failing to relitigate the claim with that newly presented evidence provided in Mr. Walker's second post-conviction petition.[2] The state court further supported its conclusion by citing to its antecedent ruling on direct appeal. Pet. App. at 9. Specifically, the state court reiterated that "asking the veniremember if he might face any ridicule were he to impose a death sentence 'was not grounded in racial discrimination." *Id.* at 9. In short, the Nevada Supreme Court not only failed to address the trial court's egregious misapplication of *Batson*, but reasserted its own flawed *Batson* analysis.

The Nevada Supreme Court's law-of-the-case ruling is reviewable by this Court as it was a decision on the merits of Mr. Walker's *Batson* claim. This Court recently reiterated that a state court's finding of res judicata is not independent of federal law when the circumstances show the claim was decided on the merits. *Foster*, 136 S. Ct. at 1745-47 & n.4 (court will review issue either "resting primarily on" or "influenced by" federal law) (citations omitted). "When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted." *Cone v. Bell*, 556 U.S. 449, 467 (2009). "To the contrary, it provides strong evidence

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[2] In Nevada, a capital habeas petitioner can overcome the state procedural default bars by showing that first state post-conviction counsel performed ineffectively. *See*, *e.g.*, *Crump v. Warden*, 934 P.2d 247, 253-54 (Nev. 1997). The Nevada Supreme Court's finding that Mr. Walker did not suffer prejudice from first state post-conviction counsel's performance was based on its antecedent holding that the *Batson* claim was without merit. Pet. App. at 9.

that the claim has already been given full consideration by the state courts and thus is ripe for adjudication." *Id.* (emphasis in original).

There is nothing in the Nevada Supreme Court's opinion to suggest it was anything other than a decision on the merits of Mr. Walker's *Batson* claim. This Court accordingly has jurisdiction to decide the present legal issue. Further, the decision by the Nevada Supreme Court warrants this Court's intervention as the state court's ruling so far departed from the accepted and usual course of judicial proceedings as to compel this Court's plenary consideration. SCR 10(a).

III. This Court's relevant precedent mandating that a specific process be followed to identify peremptory strikes undertaken with discriminatory intent

In *Batson*, this Court ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial. The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

Batson set forth a three-step burden-shifting framework for evaluating claims of discriminatory peremptory strikes. At step one, the defendant must "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170. Once the defendant makes out a prima facie case, at step two "the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes." *Id.* at 168 (internal quotation marks omitted). Finally, at step three, the trial court decides "whether the opponent of the strike has proved purposeful

racial discrimination" in light of the race-neutral explanations tendered by the State. *Id.* (internal quotation marks omitted). In making that determination, the trial court is required to evaluate the "persuasiveness" of the prosecutor's articulated reasons. *See Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) ("*Miller-El I*").

A. Certiorari review is warranted due to the Nevada Supreme Court's failure to correct the trial court's clearly erroneous application of *Batson*

In this case, the trial court blatantly disregarded step three of *Batson* by failing to assess the prosecutor's proffered reasons for striking prospective juror Henderson. Instead, the trial court judge relied on its experience as a former prosecutor in the very same office to form its own unstated impressions of Henderson, and then relied on these unstated impressions to deny Mr. Walker's *Batson* motion.

In denying relief during direct appeal and state post-conviction proceedings, the Nevada Supreme Court failed to address the trial court's glaring disregard for *Batson's* constitutional directives. Instead, the state appellate court engaged in the same impermissible exercise as the trial court: it failed to follow *Batson's* three-step inquiry and—without addressing the prosecutors alleged race-neutral submissions or even the peremptory strike itself—speculated the prosecutor's question to Henderson did not have discriminatory intent.

The Nevada Supreme Court failed to hold the trial court accountable for failing to make any factual findings related to purposeful discrimination—and more specifically the credibility of the prosecutor's proffered, race-neutral reasons—to which the state appellate court could grant deference. Thus, the Nevada Supreme Court erred—first on direct appeal and subsequently during Mr. Walker's second state post-conviction proceedings—by failing to grant a new trial or remand the case to the trial court to conduct a proper *Batson* hearing.

B. Certiorari review is warranted due to the Nevada Supreme Court's own circumvention of *Batson*

The Nevada Supreme Court concluded the question posed by the prosecutor to prospective juror Henderson "was not grounded in racial discrimination, thereby invoking *Batson*, but rather was designed to expose bias." Pet. App. at 42. The Nevada Supreme Court's ruling altogether failed to address the State's peremptory strike and Mr. Walker's *Batson* challenge, instead focusing on the relevant, yet tangential issue of whether the prosecutor's question was discriminatory. Alternatively—to the extent the Nevada Supreme Court called into question the very sufficiency of Mr. Walker's *Batson* challenge—the state court impermissibly sought to reevaluate step one. Irrespective of the meaning imputed to the ruling, the state court erred.

Generally, an appellate court reviews step one of a *Batson* inquiry by considering the totality of the circumstances in determining whether the opponent of a peremptory challenge made a prima facie case of discrimination. *Ford v. State*,

122 Nev. 398, 403 (2006). In this case, however, such analysis was rendered moot by the State's submission of three, race-neutral explanations for striking Henderson. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

Irrespective of its ability to re-assess step one, the Nevada Supreme Court's findings were patently unreasonable as Mr. Walker unequivocally made out a prima facie case of racial discrimination. "[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170.

Here, the prosecutor asked whether Henderson, as "an African-American male[,]" believed he would face "ridicule" from other African-American "associates" if he sentenced "another African-American" to die. Pet. App. at 79-80. The racist connotations are glaring; the prosecutor's question suggested Henderson, as an African-American man, would feel pressured by his Africa-American community who would criticize or reject a vote to sentence another African-American man to death. The question assumed—on the basis of his race alone—that Henderson: lived in an African-American community and associated with African-American individuals who opposed the death penalty and would ridicule other African-Americans opposing their own views on the subject. It was a question based purely

on State-sponsored stereotypes—an evil that the Fourteenth Amendment and *Batson* were designed to prevent. *See J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994) ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."). Put simply, it was the essence of racial discrimination for the State to focus on the juror's race to determine whether he would be biased.

The trial court's reformulation of the prosecutor's question further reveals its racist undertone. Following defense counsel's objection, the trial court addressed Henderson as follows:

> But would you feel in anyway [sic] constrained by virtue of your family members or your friends or anything like that, to vote for the death penalty if you felt, after you've heard all of the evidence in this case, the guilt phase, and-and assuming it gets to that in the penalty phase, if you felt that that was an appropriate sentence, would you feel in anyways [sic] hindered about rendering sentence knowing Mr. Walker is an African-American?

Pet. App. at 80. The trial court's choice of language—substituting terms like "ridicule[d]" with "constrain[ed]" and "associates" with "family" and "friends"—evidence its attempt to sanitize the prosecutor's discriminatory question. Such intent is likewise shown by its recharacterization of the question as inquiring whether the "disparate impact" of the death penalty upon African Americans would burden Henderson. *Id.* The prosecutor's question sought to ascertain nothing of the sort. Rather, the prosecutor explicitly inquired whether Henderson would be unable to sentence an African American man to death *given his own status as an African*

American man and member of the African American community. The racist connotations are obvious.

The Nevada Supreme Court's conclusion is likewise foreclosed by the prosecutor's admission that the focus of his question was Henderson's race and whether it would influence his ability to serve as a juror. Specifically, following trial counsel's objection, the State analogized its question to a "reverse race" inquiry, Pet. Pet. App. at 61 (pg. 223), seeking to find out if Henderson, as a black man, "favor[ed]" other black man—a basis for exercising peremptory strikes expressly rejected by this Court in *Batson*:

> [T]he Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

476 U.S. at 97-98. Finally, and as further discussed below, the State's discriminatory intent is established by a comparative juror analysis and evidence of the CCDA's systematic pattern of discrimination presented by Mr. Walker during state post-conviction proceedings.

The Nevada Supreme Court further misapplied *Batson* by failing to address step three. At step three, "[t]he 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 v. Mississippi*, 139 S. Ct. 2228, 2243 (2019).

In this case, the State explained it had struck Henderson because Henderson: (1) had siblings who had been incarcerated, (2) was "angry about the fact" his nephew's murder had been inadequately investigated, and (3) was equivocal whether he would vote for the death penalty. The Nevada Supreme Court noted the State's reasons were "based on an inquiry that was common to all the venire members and involved each one's personal experience with the criminal justice system and attitudes towards the death penalty." Pet. App. at 9. In other words, the Nevada Supreme Court concluded the State's reasons were race-neutral as shown by it having broached the same topics with other jurors. Having found the State complied with step two of *Batson*, the Nevada Supreme Court concluded its analysis. However, a facially race-neutral reason, "on its own, does not suffice to answer a *Batson* challenge." *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1251 (11th Cir. 2013).

The Nevada Supreme Court's acceptance of the State's facially race-neutral reasons and its failure to undertake step three of *Batson* was particularly egregious because it adopted the very analytical approach to *Batson* this Court has previously rejected. *See Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("if any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than [*Swain v. Alabama*, 380 U.S. 202 (1965)]") ("*Miller-El II*").

C. Certiorari review is warranted because a constitutional analysis conducted in accordance with *Batson* conclusively shows the State engaged in race based discrimination

Here, a step three analysis shows the State's race-neutral reasons were pretextual. "The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2241 (citing *Batson*, 476 U.S. at 97-98). In this case, the trial court expressly rejected one of the three reasons submitted by the State. Specifically, the trial court agreed with trial counsel that—contrary to the State's assertions—Henderson had not displayed anger. Pet. App. at 65 (pgs. 235-36). Neither the trial court nor the Nevada Supreme Court examined the two remaining, race-neutral reasons submitted by the State. As noted above, the trial court subverted step three of *Batson* by manufacturing, but failing to articulate, its own reasons to deny Mr. Walker's *Batson* motion. The Nevada Supreme Court ignored the trial court's improper analysis and, as previously noted, failed to address step three altogether. A review of the record reveals all three reasons were pretextual.

Here, because the Nevada Supreme Court held the peremptory challenge of Henderson was based on a question that had been likewise posed to non-African American jurors, the State's treatment of those non-African American jurors is particularly revealing. *See Boyd v. Newland*, 455 F.3d 897, 903 (9th Cir. 2006) ("Comparative juror analysis refers . . . to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership

in a particular group.") (citation and quotation marks omitted). In *Miller-El II*, this Court made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims: "More powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." 545 U.S. at 241.

Here, a comparative juror analysis reveals the State's race-neutral reasons were pretextual. The State's first race-neutral reason asserted Henderson had brothers and sisters who had been incarcerated. Pet. App. at 65 (pg. 234). However, twelve other venire members indicated they personally—or a family member or close friend—had been arrested and/or charged with a crime. NSC App. Vol. 16 at 3903. None of those prospective jurors were challenged or struck by the State. Of those twelve individuals, seven[3] served as seated jurors or alternates despite being questioned on the same subject matter by the State. NSC App. Vol. 16 at 3904.

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[3] Sandra Walles had a forty-four-year-old brother who had been in and out of prison since age eighteen. Rebecca Scovill had a brother who had been in jail two or three times for domestic violence and discharging a firearm. Adam Flores had a brother who had been in prison for possession and attempt to sell controlled substances. Matthew Sepcic had a friend who was arrested for underage drinking that occurred at a party at Sepcic's house. Michael Parkin had several friends who had been charged with driving under the influence and possession of marijuana. Nathan Christian's ex-wife had been charged with domestic violence. Stephanie Luquin had a cousin who had been caught shoplifting clothes. NSC App. Vol. 16 at 3904.

Other venire members who the State failed to challenge (but were ultimately excused following a challenge by defense counsel) despite having been arrested or

The State's second race-neutral reason claimed Henderson was angry because his nephew's murder had not been investigated by law enforcement. Pet. App. at 65 (pg. 234). However, the trial court did not credit this reason based on its own observations of Henderson. *Id.* (pg. 235). Moreover, a comparative juror analysis demonstrates that twenty-one venire members indicated they personally, or a family member or close friend, had been the victim of a crime; none were challenged or struck by the prosecutor. Of those twenty-one individuals, ten served as seated jurors or alternates.[4]

Finally, the State's third race-neutral reason—that Henderson was not sure he could vote for the death penalty—was also discredited by statements made by several venire members who the State failed to strike.[5] *Id.* (pg. 234).

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being related to individuals who had been arrested included: Bodie Frates, arrested for disturbing the peace or fighting; Randy Buckner, arrested for driving under the influence; and John Blake, whose brother had been arrested for arson. *Id.* at 3904-05.

[4] Adam Flores had an in-law who was the victim of physical abuse. Arlene Lewis's mother-in-law had her purse taken and was physically harmed in that incident. Carole Rakow had been the victim of domestic violence for ten years. Melissa Aguero had two cars stolen and a third broken into and had her purse and computer stolen from her home while she slept in another room. Melissa Butler had her purse stolen from her car by three young African-American men when she was sixteen. Michael Parkin had "quite a few friends killed over drugs and alcohol" and described himself as a victim of multiple crimes. Nathan Christian's sister had been physically attacked by an African-American man. NSC App. Vol. 16 at 3905-06.

[5] John Blake noted he "really wouldn't" want to sentence someone to die by execution. Berdine Briones did not think she could sentence someone to death, despite supporting the death penalty. June Gilbert stated, "[l]ike so many other prospective jurors before me, my answer was going to be I am in favor of the death penalty, but I wouldn't want anything to do with sentencing someone to death. I

Mr. Walker presented the above-referenced comparative juror analysis during state post-conviction proceedings. NSC App. Vol. 16 at 3910-3914. In addition, Mr. Walker presented new evidence that further revealed the State's discriminatory intent. Specifically, Mr. Walker attached a training manual provided to Nevada prosecutors during the course of their employment. NSC App. Vol. 34 at 8370. The manual lists formulaic, stock responses in the event peremptory challenges by the State are objected to as discriminatory.[6] NSC App. Vol. 34 at 8369. In essence, the materials comprise a script designed to conceal discrimination and evade *Batson* challenges. Mr. Walker also filed an audio recording of oral argument in an unrelated matter where former Nevada Supreme Court Justice Michael A. Cherry observed that prosecutors for the CCDA "knocked off African-Americans consistently" during jury selection. *Id.* at 8368-69.

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couldn't possibly want to be even remotely involved in judging another person." *Id.* at 3906-07. Upon further questioning, Ms. Gilbert asserted she could sentence someone to death if required to do so, but shortly after reiterated that she did not know if she "could judge another person."

[6] The materials advise that, should a *Batson* challenge be made, prosecutors are to:

1. Argue that you have made your challenge only in response to certain psychological responses or body language of the jurors. Be ready to explain.
2. Fully voir dire even those jurors that you intend to excuse.
3. Use some challenges on others than the members of the purported group.
4. Make it clear to the defense attorney that since the mistrial or jury dismissal has been made at his request, jeopardy has not attached and the case will be retried. The next jury panel might be even worse for him.
5. Accuse the defense attorney of being the one who is practicing group bias and ask for a hearing.

Collectively, the above-described evidence showed the CCDA engaged in a systematic pattern of discrimination when exercising peremptory strikes and, as such, comprised additional proof that the race-neutral reasons proffered to strike Henderson were pretextual. The Nevada Supreme Court, however, failed to consider this evidence of discriminatory intent as mandated by *Batson's* third step. Specifically, the Nevada Supreme Court, rather than conducting a totality of circumstances analysis under *Batson's* framework, sought to individually, and uncompellingly, discredit the evidence. Pet. App. 9.

This Court has intervened in cases presenting extreme and unusual facts when the state courts failed to consider the import of new material evidence that fundamentally altered the nature of a constitutional claim previously raised and rejected by the state court. *E.g.*, *Foster*, 136 S. Ct. at 1745-46. In such circumstances, a state court's ruling preventing re-litigation of a claim risks blinding the court to the consideration of new material facts, which require a different outcome. *Cf. Wellons v. Hall*, 558 U.S. 220, 222 (2010) (per curiam) ("perfunctory consideration" by court of appeals "may well have turned on the District Court's finding of a procedural bar"). Here, the Nevada Supreme Court's failure to consider the new material evidence in the proper context of the *Batson* framework further warrants this Court's intervention.

D. This Court should grant certiorari to ensure lower courts abide by *Batson* and appellate courts reject deviations from the constitutionally mandated framework

In *Batson*, this Court held the unlawful exclusion of jurors based on race requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice." 476 U.S. at 86-87. Moreover, "[i]n the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers*, 139 S. Ct. at 2228, 2243 (citing *Snyder v. Louisiana*, 552 U. S. at 472 (2008); *Miller-El II*).

This Court should reverse the Nevada Supreme Court's judgment based on the unconstitutional exclusion of prospective juror Henderson. Here, the lower courts failed to follow step three of *Batson* and, as a result, no court has ever determined "whether the prosecutor's proffered reasons [for striking Henderson were] the actual reasons, or whether the proffered reasons [were] pretextual and the prosecutor instead exercised peremptory strikes on the basis of race.'" *Flowers*, 139 S. Ct. at 2228, 2244 (citing *Foster*, 136 S. Ct. 1737) (internal quotation marks omitted). As such, no factual findings were ever made by the lower courts regarding the credibility of the State's purportedly race neutral reasons for striking Henderson. Instead, the trial court manufactured—and failed to articulate—its own reason, which supposedly justified the peremptory strike.

The Nevada Supreme Court similarly failed to follow step three and relieved the trial court of its obligation to evaluate whether or not the prosecutor's facially race neutral explanations for its peremptory were pretextual. Because they failed to make the necessary and relevant findings under step three, any "finding" the lower courts purported to make regarding the State's discriminatory intent does not warrant deference from this Court. *Foster*, 136 S. Ct. at 1737 (*Batson's* third step "turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous.") (citing *Snyder*, 552 U.S., at 477).

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CONCLUSION

For the foregoing reasons, Mr. Walker respectfully requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court.

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Respectfully submitted,

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