No. 21-

In the
Supreme Court of the United States

TRAVIS BOYS,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During Petitioner Boys' jury selection, prosecutors used eight of eleven peremptory strikes on Black jurors. Four of these Black jurors were asked no substantive questions by the State and gave no responses beyond basic demographic information, which was indistinguishable from that of seated white jurors.

Defense counsel objected under *Batson v. Kentucky*, 476 U.S. 79 (1986), and argued that the State's strike pattern established a prima facie case of racial discrimination. The State responded, "We simply based our cuts on the responses provided to the State." App. 11a. The trial court denied the *Batson* challenge at the first step.

On appeal, the Louisiana Fourth Circuit ruled that the pattern of strikes did not satisfy the threshold for a prima facie showing, noting that numerical evidence alone can never establish a prima facie case. Also, despite the fact that Louisiana courts routinely consider all aspects of jury selection, whether raised at trial or not, when denying relief at the first step of *Batson*, the appellate court refused to consider any aspect of jury selection beyond strike statistics on the ground that trial counsel had addressed only numerical evidence in his *Batson* objection.

The question presented is:

Whether, in conflict with *Johnson v. California*, 545 U.S. 162 (2005), the Louisiana appellate court applied an impermissibly high burden of proof at the first step of *Batson* by creating an unattainable statistical threshold and refusing to consider non-numerical evidence of discrimination that was not explicitly articulated in defense counsel's objection.

RELATED PROCEEDINGS

State of Louisiana v. Travis Boys, Louisiana Supreme Court, No. 2021-00909, reported at 326 So.3d 1245 (2021). Order denying review entered Nov. 10, 2021.

State of Louisiana v. Travis Boys, Louisiana Fourth Circuit Court of Appeal, No. 2019-KA-0675, reported at 321 So.3d 1987 (La. 4th App. 2021). Opinion filed May 26, 2021.

State of Louisiana v. Travis Boys, Orleans Parish Criminal District Court, No. 525-362. Judgment entered May 3, 2018.

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JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal was entered on May 26, 2021. The Louisiana Supreme Court denied review on November 10, 2021. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or 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

Petitioner Travis Boys has an IQ of 59 and a history of psychotic behavior. A little over a year before his arrest, he was involuntarily hospitalized after he threw himself out of a second-story window. He was released with a psychiatric prescription that he had neither the money nor the wherewithal to fill. According to the State, on June 21, 2015, Petitioner was arrested for domestic assault and shot and killed the officer transporting him to jail. He entered a plea of not guilty by reason of insanity and was found incompetent at one of his three pretrial competency hearings. At his first scheduled trial setting, the judge postponed his trial after he ate his own feces in open court. App. 5a–7a; 53a–54a; 89a; Tr. 3/22/2018, p. 101.

Petitioner was found guilty of first-degree murder after the State peremptorily struck Black jurors at more than three times the rate it struck white jurors,[1] using eight of its eleven peremptory strikes against Black jurors (72 percent) and only three against white jurors. Between its cause challenges and peremptory strikes, the State eliminated nearly 50 percent of Black jurors. Each of the State's eleven cause challenges were directed at Black jurors, and the State lodged no cause challenges against white jurors. Tr. 16–430.

The prosecution asked no substantive questions of Black jurors it struck and obtained no information from several of these jurors beyond their

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[1] This rate compares the State's non-alternate peremptory strikes of the Black jurors available after cause challenges with the State's non-alternate peremptory strikes of the white jurors available after cause challenges.

basic demographic information and their general acquiescence that they could follow the law. Despite this sparse record, the State represented that it "simply based [its] cuts on the responses provided to the State." App. 11a.

The first panel included 27 prospective jurors. After cause challenges, ten white jurors and eight Black jurors remained. The State struck three Black jurors from the first panel and no white jurors. App. 113a–114a; Tr. 176–77.

The second panel included 27 prospective jurors. After cause challenges, six white jurors, seven Black jurors, and one Asian juror remained. The State struck five Black jurors and one white juror from the second panel. App. 113a–114a; Tr. 334–37.

The third panel included 18 prospective jurors. After cause challenges, seven white jurors and four Black jurors remained. The State struck two white jurors. 113a–114a; Tr. 427–428.

At the end of jury selection, the defense objected under *Batson* to the State's eight strikes of Black jurors and requested that the State provide race-neutral reasons for these strikes. Tr. 430–31. The trial court asked the State for its response, and the State responded:

> Your Honor, I think [in] fact what we've chosen is actually racially diverse peremptory challenges. We have not discriminated in any way—African American or white or anything. *We simply based our cuts on the responses that were provided to the State*.

Tr. 431 (emphasis added). The trial court denied the *Batson* challenge and did not require that the State provide reasons for its strikes. Tr. 431.

Five of the Black jurors struck by the State gave responses in *voir dire* that revealed no conceivable basis for a State strike, and were indistinguishable from the responses of seated white jurors.

Jurors Louis Stewart, Xavier Stevens, and Matthew Sylve were struck after the State asked them only two questions: 1) whether they could return a verdict of guilty as charged knowing that life without parole was the sentence, and 2) for their basic demographic information.[2] Juror Fournette was struck after having been asked only these two questions and one additional non-substantive leading question.[3]

Specifically, the five jurors gave the following information:

- Louis Stewart said that he lived in the Mid-City neighborhood and had three children. Tr. 44. He answered "yes" to the question of whether he could return a guilty verdict notwithstanding the penalty. Tr. 74. The

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[2] Juror Louis Stewart's biographical information elicited at Tr. 44 and sentencing question response at Tr. 74; Juror Xavier Stevens' biographical information elicited at Tr. 43-44 and sentencing question at Tr. 74; Juror Matthew Sylve's biographical information elicited at Tr. 204 and sentencing question response at Tr. 227.

[3] "[A defendant is] innocent until proven guilty. But he is also sane until prove insane, at the time of the offense . . . . Ms. Fournette are you good with that?" Juror Fournette, answered "Yes." Tr. 221.

defense asked how he would feel about looking at photographs in the case, and he said "I'm okay with it." Tr. 124.

- Xavier Stevens said that he lived in the Gentilly neighborhood, was not working, was not married, had no children, and had previously worked at a type of center.[4] Tr. 43–44. He answered "yes" to the question of whether he could return a guilty verdict notwithstanding the penalty. Tr. 74.

- Matthew Sylve said that he lived in the neighborhood of Algiers, did maintenance work, was single, and had two children. Tr. 204. He answered "yes" to the question of whether he could return a guilty verdict notwithstanding the penalty. Tr. 227.[5]

- Shannon Fournette said she lived in the Uptown neighborhood. Tr. 98–99.[6] She said "yes" when asked whether she was

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[4] The record indicated that his response to the question of where he worked was partially inaudible.

[5] The appellate court counted Matthew Sylve as a white juror based on a notation on the judge's strike sheet indicating "w/m," despite the fact that neither the State nor the trial court disputed defense counsel's statement that the State struck eight Black jurors, nor did anyone dispute defense counsel's written proffer which specifically indicated that eight Black jurors were struck by the State. App. 28a. On appeal, Petitioner requested an alternative remedy of a remand in order to introduce evidence of juror Sylve's voter registration record indicating he is a Black man.

[6] The remainder of her answer to the demographic question was inaudible.

comfortable with the burden of proof in an insanity case. Tr. 221. She answered "yes" to the question of whether she could return a guilty verdict notwithstanding the penalty. Tr. 224.

- Latressia Matthews said that she lived in the Algiers neighborhood, was married, had three children and worked at the New Orleans Sewerage and Water Board. Tr. 203. When asked if she understood the difference between "crazy" in a colloquial sense and "legally insane," she said she did. Tr. 222–23. She answered "yes" to the question of whether she could return a guilty verdict notwithstanding the penalty. Tr. 225. In response to a question by the trial court, she indicated that she had previously sat on a jury that found the defendant guilty of a drug crime. Tr. 190.[7] In response to defense questioning, she indicated that she owned a 9mm handgun and was familiar with the mechanics of handguns. Tr. 270–71. The defense and State each exercised a peremptory strike on Ms. Matthews. Tr. 335–36.

The State elicited no other information about these five Black jurors.

The responses given by multiple seated white jurors make clear that nothing about these Black jurors' answers could have been the actual reason for

[7] While the juror in this exchange was unidentified in the transcript, the judge's trial notes indicate that it was Ms. Matthews.

the strikes. Seated white jurors gave answers that were indistinguishable from those of the struck Black jurors. White juror Bradley Rice reported living in Algiers (like struck Black jurors Matthew Sylve and Latressia Matthews), being married (like Ms. Matthews), having no children (like struck Black juror Xavier Stevens), and working as an engineer.[8] White juror Shelley Deatley reported living in Mid City (like struck Black juror Louis Stewart), being married (like Ms. Matthews), having three children (again like Mr. Stewart and Ms. Matthews), and working as a secretary.[9] White juror Ellen Dunbar reported living in Lakeview, being married and having three children (like Ms. Matthews) and working as an attorney doing tax work for the Plaquemines Parish Assessors Office.[10]

None of these seated white jurors provided any other information in response to the State's questioning that could have differentiated them. Other than providing their demographics, which matched those of the struck Black jurors, the seated white jurors responded identically to these struck Black jurors that they could return a verdict of guilty notwithstanding the penalty. Two of these seated white jurors were additionally directed to answer leading questions by the State that provided no substantive information.[11] One

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[8] Tr. 201.

[9] Tr. 39.

[10] Tr. 42–43.

[11] Mr. Rice and Ms. Deatley were asked "call and response" questions where the prosecutor appeared to be attempting to educate the panel by asking leading questions to a particular juror. For instance, Bradley Rice was asked: "Mr. Rice would you agree with me if I told you that every investigation, be it a homicide or a sexual assault—all cases render different types of evidence,

other was asked only for her demographics, whether she could return a verdict of guilty notwithstanding the penalty, and whether she could remember any details from the news about the case—to which she responded "no,"—she only remembered having heard the decedent's name.[12] Despite this, these three white jurors were allowed to serve, while their Black counterparts, jurors Stewart, Stevens, Sylve, Fournette, and Matthews were inexplicably struck by the State.

The prosecution's strike of Latressia Matthews is significant in itself, and this strike alone should have raised red flags to even a layperson observing *voir dire*. Not only did Ms. Matthews' responses to the State's demographic questions match those of multiple seated white jurors—for example, like seated white juror Ellen Dunbar, Ms. Matthews was a) married, b) had three children, c) and worked for a local government agency[13]—the additional information she provided in *voir dire* revealed her to be an ideal juror for the State, prompting the defense to request that she be peremptorily struck. Like seated Asian juror, Dung Duong, Ms. Matthews reported owning a 9mm handgun,[14] and additionally reported that she had

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right? . . . . Would you agree that all homicides can render different types of evidence, right? . . . . Those would all yield different types of evidence right?" Tr. 235–36. To these questions asked in direct sequence, Mr. Rice responded "Right" after the prosecutor said, "Right?" Tr. 235–36. These responses gave prosecutors no information other than the juror's willingness to echo "right."

[12] Ms. Dunbar responded to a question posed to the entire jury regarding whether she had heard anything about the case on the news. Tr. 166.

[13] Tr. 203.

[14] Tr. 270.

previously sat on a jury and voted to convict in a drug case, providing a guilty verdict to the State. Tr. 190.

Outside of the context of jury selection, the trial itself supports the claim that racial bias was at work in the selection of the jury. The trial was infected by racial overtones. During the State's closing argument, the prosecutor referred to Petitioner, a Black man, as "this little savage." App. 24a. Moreover, the State's forensics expert at trial had testified in a pretrial competency hearing that IQs should be adjusted upward based on race, and the same expert made oblique references to these adjustments at trial. App. 25a–26a. Finally, the State, in its closing, repeatedly depicted Petitioner as a street-smart drug dealer despite a total lack of admissible evidence in support of such a theory. App. 24a.

Petitioner argued all of these facts in support of his *Batson* claim on appeal. After briefs were filed before the Louisiana Fourth Circuit, the State joined the defense in requesting that the case be remanded to the trial court in order to complete *Batson* steps two and three. App. 105a–112a. The State agreed "that the hearing be conducted as though a prima facie case of racial discrimination has been made" and that "evidence of the reasons for the State's strikes shall be introduced through testimony subject to cross examination by the opposing party as well as through the introduction of any relevant documentary evidence or exhibits . . ." App. 109a–110a.

Despite the request of all parties to remand the case for completion of steps two and three of the *Batson* analysis, the Louisiana Fourth Circuit denied the joint motion to return the matter back to the trial court (App. 101a–102a), held oral argument, and

issued the opinion that gives rise to this petition (App. 2a–100a).

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Ruling Violates the Directive of *Batson* and *Johnson* that Courts Should Consider All Relevant Circumstances of Jury Selection.

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). This Court has given effect to that democratic right by requiring transparency in the reasons for a party's peremptory strikes: where a prima facie case of discrimination is present, the reasons for the State's strikes must be provided, and "[t]he trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Id.* at 2241.

The three-step framework laid out in *Batson v. Kentucky*, 476 U.S. 79 (1986), "is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005). Actual answers are preferred over "needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 172.

In this case, Petitioner sought "actual answers" as to why prosecutors used eight of their eleven strikes on Black jurors. The prosecution's response that it "simply based [its] cuts on the answers

provided to the State" was plainly false. In ruling that Petitioner had failed to make a prima facie case, the appellate court improperly barred consideration of overwhelming evidence of racial discrimination and imposed an impermissibly high threshold at *Batson's* first step, in violation of *Johnson v. California*.

a. ***Batson* and *Johnson* set only a minimal threshold at step one.**

The three-step process for adjudicating a claim of racial discrimination in the prosecution's use of peremptory strikes is well-established:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 578 U.S. 488, 499–500 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008)).

The burden at step one is minimal. "[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. This first step is not intended "to be so onerous that a defendant would have to persuade the judge—on the basis of all the

facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." *Id.* Rather, even "inferences that discrimination may have occurred [are] sufficient to establish a prima facie case under *Batson*." *Id.* at 173.[15] *Batson* does not "require at step one that the objector show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *Id.* at 163.

The pattern of strikes, the prosecutors' failure to ask substantive questions in *voir dire*, the largely identical answers to State questioning, and the glaring similarity of white seated and Black struck jurors all raise an inference that racial discrimination played a role in the State's strikes. The State knew very little, and nothing of consequence, about jurors Sylve, Stewart, Fournette, and Stevens, and yet struck them from the jury. Nothing about these jurors' basic demographics raises even a conceivable basis for a strike, especially in comparison to demographic information for seated non-Black jurors.

Additionally, what the State knew about juror Matthews was that she could be a very good juror for the State, given that she had sat on a convicting jury

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[15] As applied by the Louisiana Supreme Court, the "combination of factors needed to establish a prima facie case are: (1) the defendant must demonstrate that the prosecutor's challenge was directed at a member of a cognizable group; (2) the defendant must then show that the challenge was peremptory rather than for cause . . . ; and (3) finally, the defendant must show circumstances sufficient to raise an inference that the prosecutor struck the venireperson on account of race." *State v. Myers*, 99-1803, p. 4 (La. 04/11/00); 761 So. 2d 498, 501 (citing *Batson*, 476 U.S. at 96).

before, voted in support of that guilty-as-charged verdict, owned a 9mm handgun, and had knowledge of the mechanics of handguns.

These facts raise a clear inference of racial discrimination, and the trial court should have proceeded to steps two and three of *Batson*. *See Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333, 1339 (11th Cir. 2012) (considering nature of the questioning of jurors in finding trial court should have proceeded to steps two and three).

Even setting aside the striking similarity of the *voir dire* responses given by Black jurors struck by the State to white jurors allowed to serve, the numerical pattern of strikes alone in this case raises an inference of racial discrimination. At Petitioner's trial, the State used eight of its non-alternate petit jury peremptory strikes against Black jurors and only three against white jurors. Between its cause and peremptory challenges, the State eliminated nearly 50 percent of available Black jurors; as a result, the percentage of Black jurors on the jury represented a 25 percent decrease in Black representation from the venire. Further, the State initially accepted three of the Black jurors it later struck after jury selection had moved on to additional panels. Despite these record statistical showings and the directives of this Court, the Louisiana Fourth Circuit improperly found, based on Louisiana precedent, that no statistical evidence could ever be sufficient on its own to make a prima facie case under *Batson*. App. 23a (citing *State v. Williams*, 13-0283, pp. 16-17, (La. App. 4 Cir. 9/7/16), 199 So.3d 1222, 1232–33; *State v. Dorsey*, 10-0216, p. 15 (La. 9/7/11), 74 So.3d 603, 617). Louisiana's rule that no statistical showing can ever establish a prima facie

case has no basis in this Court's *Batson* jurisprudence. *See infra*, Section II.a.

b. Under this Court's jurisprudence, trial and appellate courts must take into account all relevant circumstances of jury selection in considering *Batson* claims.

This Court has repeatedly instructed trial courts to consider "all relevant circumstances" in determining whether a *Batson* violation has occurred. *Batson,* 476 U.S. at 96. The rule is not discretionary. Rather, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. at 478 (2008) (citing *Miller–El v. Dretke,* 545 U.S. 231, 239 (2005)). *Batson* made clear that the requirement to consider all relevant circumstances relating to jury selection applies to step one of the *Batson* analysis. And in *Batson* itself, this Court emphasized that a prosecutor's *voir dire* questioning "may support or refute an inference of discriminatory purpose" at the first step. *Batson*, 476 U.S. at 97.

Nothing in this Court's *Batson* cases suggests that a court may limit consideration of a step-one *Batson* claim to the facts that are specifically raised by defense counsel to the trial court. *Id*. Indeed, this Court has multiple times considered on appeal facts relating to jury selection that were not specifically articulated by trial counsel in support of the *Batson* claim. *See Snyder v. Louisiana*, 552 U.S. at 478 (finding *Batson* error upon comparing juror responses in

the transcript despite defense counsel having articulated no comparison of responses in his *Batson* objection at trial); *Miller–El v. Dretke*, 545 U.S. at 242. *See also Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (considering evidence of the history from Flowers' six trials, disparate questioning by the prosecutor, the striking of one Black juror who was similarly situated to white jurors allowed to serve, and the State's strikes of five Black jurors at trial—though only four of those strikes of Black jurors had been challenged below).

In finding *Batson* error, this Court in *Miller-El* explicitly rejected the State's argument that consideration of evidence in the form of a comparative juror analysis had been "waived" because such analysis had not been included in defense counsel's *Batson* argument before the trial court. *Id.* at 242 n.2. *See also Sanchez v. Roden*, 753 F.3d 279, 299 (1st Cir. 2014) (holding that the lower court "unreasonably applied *Batson's* first prong [when reviewing trial court's ruling] in that it failed to consider all of the circumstances bearing on potential racial discrimination.").

The appellate court in this case refused to consider apparent and compelling evidence of racial discrimination on the ground that its review of a *Batson* challenge is limited to the facts specifically stated by trial counsel. App. 17a–18a.[16] That conclusion has

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[16] Louisiana's Fourth Circuit ruled:

> However, here, Mr. Boys relied solely on the number of black jurors struck by the State to support the inference of racial discrimination in the trial court. Therefore, once the trial court determined that the number of the strikes did not support a prima facie case of racial discrimination, the State was relieved

no support in this Court's *Batson* cases. In *Snyder*, this Court reiterated the obligation of courts to review all relevant facts, whether "in considering a *Batson* objection, *or* in reviewing a ruling claimed to be a *Batson* error. . . ." *Snyder v. Louisiana*, 552 U.S. at 478 (2008) (emphasis added). Indeed, the idea that the nature of *voir dire* questioning was not before the trial court runs counter to the faith that appellate courts place in trial courts to supervise jury selection and consider all the facts.

Appellate courts rightly rely on the fact that trial courts carry out their duty to consider the context of jury selection in determining whether a *Batson* violation has occurred. "We have confidence that trial judges, experienced in supervising *voir dire,* will be

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> of any obligation to provide a race neutral reason for its strikes. Hence, *the State's explanation that its strikes were based on juror responses was not a necessary consideration by the trial court in its ruling.*
>
> Moreover, as the State correctly notes, '[i]t is well settled that a new basis for an objection cannot be raised for the first time on appeal.' *See State v. Sims*, 426 So.2d 148, 155 (La. 1983). We therefore do not consider those arguments Mr. Boys failed to raise at the time of Mr. Boys' *Batson* challenge, and as such, need not conduct a comparative juror analysis in determining the legitimacy of the State's purported reasons for its strikes when Mr. Boys neglected to cite or proffer a juror analysis of those reasons at trial. Instead, the relevant inquiry into whether Mr. Boys made a prima facie showing of racial discrimination shall be limited to the supporting evidence he, in fact, proffered before the trial court; namely, evidence that the State improperly utilized eight of its eleven peremptory challenges against black jurors.

App. 17a–18a (emphasis added).

able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson v. Kentucky,* 476 U.S. 79, 97 (1986). This assumption—that trial courts are competent and equipped to evaluate the whole of jury selection—is the basis of the great deference that is afforded to trial courts' determinations as to whether a *Batson* violation has occurred. In particular, Louisiana courts give "great deference" to the trial court's ruling on step-one *Batson* claims (reversing only for "clear error"), despite the fact that no credibility findings are involved. *State v. Duncan*, 1999-2615 (La. 10/16/01), 802 So. 2d 533, 547.

The entire rationale given for granting such deference is that the trial court possesses the ability to evaluate the whole of jury selection; after all, "[t]he trial judge observes first-hand the demeanor of the attorneys and venirepersons, the nuances of questions asked, the racial composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold record." *State v. Duncan*, 802 So. 2d at 547–48. Moreover, "[t]he trial judge's rulings and observations are integral to a review of a *Batson* challenge because of his or her unique role in the dynamics of a voir dire." *Id*. *See also State v. Simon*, 51,778 (La. App. 2 Cir. 1/10/18), 245 So. 3d 1149, 1162–63, *writ denied*, 2018-0283 (La. 11/5/18), 255 So. 3d 1052. *But see Batson v. Kentucky*, 476 U.S. at 98 (1986) (granting "great deference" to trial court's determinations because the *Batson* decision turns on issues of credibility, which is at issue only at step three); *United States v. Stephens*, 421

F.3d 503, 511 (7th Cir. 2005) (stating that prima facie rulings warrant *de novo* review).

Louisiana courts cannot have it both ways: They cannot afford great deference to trial courts at step one on the grounds that trial courts competently consider the whole of jury selection, and then refuse to consider the whole of jury selection on the grounds that such facts were not before the court. Specifically, in this case, the appellate court refused to consider *voir dire* content on the basis that "the State's explanation that its strikes were based on juror responses was not a necessary consideration by the trial court in its ruling." App. 17a. Indeed, in violation of *Batson* and *Johnson*, Louisiana courts only consider the entire record of *voir dire* on appeal when the facts contained in *voir dire* support denial of the *Batson* claim. *See infra*, Section II.c.

The appellate court's refusal to consider relevant evidence of racial discrimination amounted to a rewriting of the fundamental rule of *Batson* and allowed it to raise the threshold of *Johnson v. California* above the minimal evidentiary showing at step one. Moreover, in Petitioner's case, the appellate court *did* rely on certain facts from jury selection not mentioned before the trial court (the lack of "targeted" questioning of Black jurors by the prosecutor)—just not the ones that offered compelling support of the *Batson* claim. App. 23a.

The appellate court should have considered the overall context of jury selection, as it routinely does when it denies *Batson* claims. Its failure to consider evidence that the *Batson* analysis requires was error.

c. The questions to and responses from jurors were put before the trial court, and should have been considered by the appellate court.

The issue of what Black jurors were asked and the answers they gave was properly before the trial court and should have been considered as part of the *Batson* analysis on appeal. The prosecution's statement—"We simply based our cuts on the responses that were provided to the State"— explicitly put at issue whether jurors' responses to the State did indeed explain the State's strikes. The trial court denied the *Batson* motion immediately after this response by the State. App. 11a.

As in *Miller-El*, the strikes against five Black jurors "correlate with no fact as well as they correlate with race." *Miller-El v. Dretke*, 545 U.S. 231 at 266. Given that the record of *voir dire* reveals the State's *Batson* defense before the trial court to be untruthful, such evidence is both appropriate and necessary to consider, and the appellate court's refusal to do so violates *Batson*.

II. In Step-One *Batson* Cases, Louisiana Courts Have Set an Impermissibly High Standard That Conflicts with *Johnson's* Minimal Requirement and Results in Little Meaningful Review of Step-One *Batson* Claims.

Louisiana has established a step-one *Batson* standard that is nearly impossible to meet. Under Louisiana precedent, no statistical pattern of strikes

could ever constitute a prima facie case without additional, non-numeric evidence.

Louisiana courts urge that "it is important that the defendant come forward with facts, not just numbers alone, when asking the district court to find a prima facie case." *State v. Duncan*, 1999-2615 (La. 10/16/01), 802 So. 2d 533, 550. However, the primary non-numeric factors that Louisiana courts rely on are most often immaterial to the question of whether discrimination was present, and artificially weigh against a finding of a violation. Certain Louisiana non-numeric factors are unlikely to be present even in cases in which racial discrimination is genuinely at work, and other factors are simply irrelevant to the consideration of whether strikes in a given case were racially motivated.

Moreover, courts in Louisiana disregard or discount certain non-numeric evidence when it supports a *Batson* claim, but readily rely on such evidence when it undermines a *Batson* claim.

a. Louisiana appellate courts set an impossibly high numerical threshold by holding that "bare statistics" are never sufficient to make out a prima facie case.

Louisiana courts have repeatedly held, as the appellate court in Petitioner's case reiterated, that a "defendant's reliance upon statistics alone does not support a prima facie case of race discrimination." App. 23a (quoting *State v. Dorsey*, 2010-0216 (La. 9/7/11), 74 So. 3d 603, 617, (in which State struck Black jurors at a rate more than three times the strike

rate for white jurors)). *See also State v. Turner*, 2016-1841 (La. 12/5/18), 263 So. 3d 337, 386 ("[B]are statistics alone are insufficient to show a prima facie case of discrimination" where State used six of seven strikes on Black jurors); *State v. Alridge*, 2017-0231 (La. App. 4 Cir. 5/23/18), 249 So. 3d 260, 283, *writ denied*, 2018-1046 (La. 1/8/19), 259 So. 3d 1021 ("The Louisiana Supreme Court has held bare statistics are insufficient to support a *prima facie* case of discrimination") (citing *Duncan*, 802 So. 2d at 550) (reversed on other grounds, *cert. granted, judgment vacated,* 140 S. Ct. 2710 (2020)); *State v. Williams*, 2013-0283 (La. App. 4 Cir. 9/7/16), 199 So.3d 1222, 1237 (finding that "Mr. Williams failed to come forward with facts or context, beyond the bare number of African-Americans the prosecutor struck, to develop a record to support the asserted *Batson* violation" at step one where "defense counsel's sole ground for making a *Batson* challenge was the prosecution's pattern of strikes—eleven of its eleven strikes (100%) against African Americans."); *State v. Holand*, No. 2011-K-0974, 11/18/2011 (finding that "it is important for the defendant to come forward with facts, not just numbers alone, when asking the district court to find a prima facie case" where State used ten of eleven strikes on Black jurors, nine of whom were women).[17]

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[17] Notably, in 2009, the Louisiana Supreme Court did reverse a trial court's finding that there was no prima facie case, and it did so based solely on the statistical evidence. *State v. Drake*, 2008-1194 (La. 1/30/09), 2 So. 3d 416, 417. However, the Louisiana Supreme Court quickly returned to the earlier rule, and the case has rarely been invoked since. *See, e.g., State v. Maxwell*, 2009-2235 (La. 4/16/10), 33 So. 3d 155 (citing *Drake* in support of ruling limiting relief for step-one violations).

The Louisiana Supreme Court has dismissed statistical evidence as mere "number games," *State v. Duncan*, 802 So. 2d at 550, and has repeatedly denied review of step-one *Batson* cases presenting compelling statistical evidence of racial discrimination. *See, e.g., State v. Alridge*, 249 So. 3d at 283, *writ denied*, 2018-1046 (La. 1/8/19), 259 So. 3d 1021 (five of six strikes used on Black jurors) (reversed on other grounds, *cert. granted, judgment vacated,* 140 S. Ct. 2710 (2020)); *State v. Simon*, 51,778 (La. App. 2 Cir. 1/10/18), 245 So. 3d 1149, 1160, *writ denied*, 2018-0283 (La. 11/5/18), 255 So. 3d 1052 (no prima facie case where State used four of five initial strikes on Black jurors from panels where only 38 percent of available jurors were Black); *State v. Thibodeaux*, 2020-91 (La. App. 3 Cir. 3/17/21), 313 So. 3d 445, 465, *reh'g denied* (Apr. 28, 2021), *writ denied*, 2021-00751 (La. 10/5/21), 325 So. 3d 374 (five of six initial strikes used on Black jurors); *State v. Allen*, 2003-2418 (La. 6/29/05), 913 So. 2d 788, 801–803 (State used five of ten strikes to eliminate five of eight available Black jurors). *See also State v. Romero*, 2021-173 at *43 (La. App. 3 Cir. 12/15/21) (finding no prima facie case where State struck four of five available Black jurors and failed to elicit any information from one of the struck Black jurors).

The rule that "bare statistics alone" can never establish a prima facie case stems from a basic grammatical misreading of *Batson*. In *State v. Duncan*, the court dismissed reliance on statistical evidence as "inconsistent with *Batson* in which the court instructed trial courts to consider 'all relevant circumstances.'" 1999-2615 (La. 10/16/01), 802 So. 2d 533, 550 (quoting *Batson* 476 U.S. at 96–97). However, this Court in

Batson never required that non-numeric evidence be presented, but merely emphasized that, should there be other non-statistical relevant evidence, the courts must consider it. *Batson v. Kentucky*, 476 U.S. at 80 (1986) ("[T]he defendant must show that such facts and any other relevant circumstances raise an inference [of racial discrimination]").

Louisiana's rule is impossible to square with the language of this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). In *Miller-El*, this Court found at step three "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. . . . Happenstance is unlikely to produce this disparity." *Id*. at 342. The point is even more salient at step one. Getting "actual answers to suspicions and inferences," *Johnson v. California*, 545 U.S. at 172 (2005), will too often be impossible without relying singularly on numerical evidence at the first stage.

b. At *Batson* step one, Louisiana courts rely on factors that artificially weigh against relief while ignoring factors that reveal discrimination.

The non-numeric factors frequently relied on by Louisiana courts in evaluating step-one *Batson* claims selectively bias the test against a finding that an inference of discrimination exists. In other words, Louisiana appellate courts have selected for factors

that support denial of relief while ignoring factors that weigh in favor of granting relief.[18]

In particular, Louisiana courts rely heavily on five factors first invoked in *State v. Draughn* 05–1825, pp. 26–27 (La.1/17/07); 950 So. 2d 583, as a basis, in that case, for finding that there was no prima facie case of racial discrimination: (1) whether the "nature of the case" involved "overt racial overtones;" (2) the timing of the *Batson* objection; (3) the "tenor of the voir dire questioning;" (4) the composition of the seated jury; and (5) whether the trial judge indicated that the issue was "very close." *Id.* at 603–04. *See also State v. Dorsey*, 74 So. 3d at 616; *State v. Thibodeaux*, 2020-91 (La. App. 3 Cir. 3/17/21), 313 So. 3d 445, 464, *reh'g denied* (Apr. 28, 2021), *writ denied*, 2021-00751 (La. 10/5/21), 325 So. 3d 374; *State v. Reeves*, 2018-0270 (La. 10/15/18), 254 So. 3d 665, 673–74; App. 22a–23a. Louisiana courts rely on these factors regardless of whether such factors were presented to the trial court during *Batson* argument.

These identified factors seldom will capture the universe of cases that genuinely raise an inference of racial discrimination and are selectively relied on to deny *Batson* claims:

Overt racial overtones. Few cases in contemporary courtrooms involve "overt racial overtones." Indeed, the *Draughn* court found this factor weighed against the defendant in *Draughn* merely because the

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[18] In *State v. Allen*, 2003-2418 (La. 6/29/05), 913 So. 2d 788, 800, the Louisiana Supreme Court violated *Hernandez v. New York*, 500 U.S. 352, 352 (1991) by refusing to consider the reasons proffered by the prosecutor for the strikes on grounds that there was no prima facie case. In *Allen*, the appellant argued that the prosecutor's stated reasons repeatedly misrepresented the record and were clearly pretextual. *Id.* at 797.

defendant and the victim in the case were the same race. *State v. Draughn*, 950 So. 2d at 603. This is wildly illogical. Where the victim and defendant are of the same race, the fact of their shared race might preempt the sometimes-relevant consideration that prosecutors may take advantage of their disparate races to select primarily jurors who share the victim's race. However, the fact that a defendant and victim are of the same race is not affirmative evidence that racial discrimination was not employed in jury selection.

Further, in Petitioner's case, the appellate court simply ignored the fact that Petitioner did specifically argue that racial overtones infected the trial—including the prosecution's use of the slur "this little savage" to refer to Mr. Boys in closing argument (App. 24a)—and that such evidence should be considered in support of a *Batson* claim.

Timing of the *Batson* objection. Louisiana courts find this factor weighs against a finding of a prima facie case if the objection, though timely, is not made immediately after the challenged strike. *See, e.g.*, *State v. Draughn*, 950 So. 2d at 604. The timing of *Batson* objections is entirely irrelevant to the prosecutor's motivation, especially given that the basis of the objection often does not arise until there is a pattern. *See Lisle v. Welborn*, 933 F.3d 705, 715 (7th Cir. 2019) (noting that the "objecting party might not even be aware of a violation until several strikes have been made, or even until all peremptory strikes have been exercised by all parties").

Tenor of the *voir dire* questioning. The "tenor of the *voir dire* questioning" invites the very kind of evidence that Petitioner has urged the court

to consider. This factor largely drops out of the language of the Louisiana courts' later description of the *Draughn* factors, *see, e.g., State v. Dorsey,* 74 So. 3d at 616, but is reinserted when the factor weighs against a defendant, *see, e.g., State v. Reeves*, 254 So. 3d at 673 (finding that the trial court "could and did take into consideration the overall tenor of the voir dire questioning").

In Petitioner's case, the appellate court changed the language of the factor, dropping the phrase "overall tenor of the *voir dire* questioning" and referring only to whether or not the prosecutor had specifically targeted any juror for questioning. Had the appellate court used the original language of *Draughn*, the factor would have weighed heavily in Petitioner's favor. *See Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333, 1339 (11th Cir. 2012).

Indeed, the entire point of Petitioner's argument is that the prosecutors, far from targeting any Black juror for questioning, failed to present them with any meaningful questions at all.

Composition of the seated jury. Where the venire contains a significant percentage of Black jurors, the presence of some remaining Black jurors within the ultimate composition of the jury is often irrelevant to the *Batson* analysis. If the venire involves only a very small number of Black jurors and each was struck, courts should certainly consider that the ultimate jury was all-white, because otherwise a pattern would never be found on the basis of so few strikes. But where, as here, the demographic composition of Orleans Parish in 2017 was 60 percent Black and the original venire was 56 percent Black, it would

be nearly impossible even for the most racially motivated prosecutor to remove all Black jurors.

Indeed, the strike of a single juror on the basis of race violates *Batson*, *see Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019), and the seating of one or more Black jurors does not negate a claim of racial discrimination.

Whether the trial court indicated that the issue was "very close." Finally, the *Draughn* court, citing *Johnson v. California*, relied on the fact that there was no statement by the trial court that the issue was a close one. But there is no reason to believe that such comments, while relevant in *Johnson*, are commonplace enough for courts to consider the absence of such a comment to be in any way meaningful in the vast majority of cases.

Under *Batson*, step one may not be reduced to a finite set of often-unhelpful factors. On the contrary, the inquiry must include all relevant circumstances, and a court that fails to address the wide-ranging facts that might bear on the issue of racial discrimination is "unreasonably appl[ying] *Batson's* first prong. . . ." *Sanchez v. Roden*, 753 F.3d 279, 299 (1st Cir. 2014) (finding that court "improperly dismissed the racial challenge out-of-hand by its facile and misguided resort to the undisputed fact that the prosecutor had allowed some African Americans to be seated on the jury.").

c. Despite refusing to consider the facts of jury selection that support a *Batson* claim, Louisiana courts routinely consider the entirety of jury selection when the facts weigh against a *Batson* claim.

Louisiana appellate courts routinely consider circumstances of jury selection beyond the specific facts articulated in trial counsel's *Batson* objection in order to deny *Batson* claims.[19] The appellate court's opinion that it could not consider facts that were not articulated to the trial court was, therefore, disingenuous.

In *State v. Sparks*, defense counsel objected to the prosecutor's use of peremptory strikes, offering only that the objection was based on "the State's systematic exclusion of Blacks from the jury." *State v. Sparks*, 1988-0017 (La. 5/11/11), 68 So. 3d 435, 470. In denying relief, the court looked to the entire record and found:

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[19] *See State v. Draughn,* 2005-1825 (La. 1/17/07), 950 So. 2d 583, 603 ("Our review of the entire voir dire convinces us that the mere invocation of *Batson* when minority prospective jurors are peremptorily challenged in the trial of a minority defendant does not present sufficient evidence in this case to lead to an inference of purposeful discrimination."). *See also State v. Simon*, 51,778 (La. App. 2 Cir. 1/10/18), 245 So. 3d 1149, 1163, *writ denied*, 2018-0283 (La. 11/5/18), 255 So. 3d 1052 (analyzing jurors' responses one by one); *State v. Dorsey*, 74 So. 3d at 618; *State v. Anderson,* 2006-2987 (La. 9/9/08), 996 So. 2d 973, 1005–06; *State v. Duncan*, 1999-2615 (La. 10/16/01), 802 So. 2d 533, 551 (engaging in a full review of *voir dire* beyond the pattern of strikes raised by defendant and determining that struck jurors were "predictable targets").

> [W[e have closely examined the voir dire of Ms. Evans to decide if the trial court erred in implicitly finding the defendant failed to establish a prima facie case of purposeful discrimination. We find there was nothing obvious in Ms. Evans's voir dire colloquy that might have raised a reasonable inference of racial exclusion.

State v. Sparks, 68 So. 3d at 471.

The *Sparks* court undertook a detailed analysis of the juror's answers and repeatedly emphasized the thoroughness of its evaluation of the overall context of jury selection. *Id.* at 472. "It is clear from the voir dire and all relevant circumstances that there were obvious reasons for the trial judge to determine the defendant failed to establish the threshold requirements of a prima facie case," the court found. "[T]here are obvious reasons for the peremptory challenge of Ms. Evans."

The *Sparks* opinion is representative of the consistent approach of Louisiana appellate courts. *See State v. Reeves,* 254 So. 3d at 674 (rejecting appellate arguments as to one juror comparison, noting that "it does not include the entirety of voir dire, which this Court considered on direct review"); *State v. Anderson*, 2006-2987 (La. 9/9/08), 996 So. 2d 973, 1005–06; *State v. Dorsey*, 74 So. 3d at 618; *State v. Duncan*, 802 So. 2d at 551 ("Indeed, while *Batson* cites a "pattern of strikes" as an example of the type of evidence that can give rise to an inference of discrimination, another equally significant example *Batson* cites is the voir dire.") (finding after a review of *voir dire* that struck jurors were "predictable targets"); *State v.*

Simon, 245 So. 3d at 1163, *writ denied*, 2018-0283 (La. 11/5/18), 255 So. 3d 1052 (analyzing jurors' responses one by one). *Cf. State v. Romero*, 2021-173 (La. App. 3 Cir. 12/15/21) (denying relief by refusing to consider facts not specifically Stated by trial counsel).[20]

As explained above, the appellate court in Petitioner's case did, in fact, consider facts pertaining to jury selection not articulated in trial counsel's objection when it denied the *Batson* claim. Specifically, the court considered the question of whether struck Black jurors had been targeted for excessive questioning. They clearly were not, given that they had been asked almost nothing at all, and the appellate court applied this factor against a finding of a *Batson* violation.

III. Requiring that Courts Comply with *Johnson v. California* by Setting a Low Threshold Imposes Very Little Burden on the Criminal System.

The purpose of the *Batson* framework, as outlined in *Johnson v. California*, is to produce actual answers to the question of why jurors were struck. *Johnson v. California*, 545 U.S. at 172 (U.S. 2005) (citing *Batson* 476 U.S., at 97-98, and n.20, 106 S.Ct. 1712.). The *Batson* process is efficient and allows for "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Hernandez v. New York*, 500 U.S. 352, 358 (1991).

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[20] In *Romero*, the appellate court relied on a State rule that barred consideration of new "issues" but not new facts. *Id.* at *48.

Holding Louisiana to the prima facie standard adds little burden, if any, to courts and prosecutors. Indeed, some jurisdictions have eliminated the step-one showing entirely, either in state court rulings, *see State v. Holloway*, 209 Conn. 636, 553 A.2d 166 (1989), and *State v. Chapman*, 317 S.C. 302, 305–06, 454 S.E.2d 317, 319–20 (1995), or by state rule or statute, *see* Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37); CAL. CIV. PROC. CODE § 231.7.

At Petitioner's trial, requiring the prosecutor's reasons would have taken only moments of the court's time. Very little was asked of the courts and the prosecutors, and yet, the appellate court went to great lengths to avoid requiring a simple answer to the question of why Black jurors were struck.

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There are no conceivable bases for the strikes of five Black jurors in this case, and the prosecutor's argument that they were struck based on their answers is contradicted by the record evidence. The courts below erred by imposing the impermissibly high standard that Louisiana courts have adopted for step-one analyses, in conflict with *Batson* and *Johnson*, and by explicitly refusing to consider clear record evidence from *voir dire* establishing the existence of a prima facie case of racial discrimination by the State in Mr. Boys' jury selection.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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