No._____

IN THE
SUPREME COURT OF THE UNITED STATES

GLEN E. SEALS, *Petitioner*

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Johnson v. California*, 545 U.S. 162 (2005), a court may supply and consider potential race-neutral reasons for a prosecutor's peremptory strike at the prima facie stage of the *Batson v. Kentucky*, 476 U.S. 79 (1986) framework?
2. Whether the denial of a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), is a mixed question of fact and law or a purely factual one, and, if purely factual, whether a federal habeas court reviews that determination under § 2254(d) or § 2254(e)?

PARTIES TO THE PROCEEDING

The petitioner is Glen Seals, the petitioner and petitioner-appellant in the courts below. The respondent is Darrel Vannoy, Warden, Louisiana State Penitentiary, the respondent and respondent-appellee in the courts below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Glen Seals respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit, which upheld the District Court's denial of habeas relief.

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals is reported at *Seals v. Vannoy*, 1 F.4th 362 (5th Cir. 2021) (Pet. App. A). The Fifth Circuit denied panel rehearing and rehearing *en banc* in an unreported decision. *Seals v. Vannoy*, No. 19-30447 (5th Cir. July 13, 2021) (Pet. App. B). The District Court dismissed Mr. Seals' petition for habeas corpus in an unreported decision. *Seals v. Vannoy*, No. 16-982 (E.D. La. May 6, 2019) (Pet. App. C). The opinion of the Louisiana Fifth Circuit Court of Appeal affirming Mr. Seals' conviction on direct appeal is reported at *State v. Seals*, 09-1089 (La.App. 5 Cir. 12/29/11); 83 So. 3d 285 (Pet. App. D). The decision of the Louisiana Supreme Court denying review on direct appeal is reported at *State v. Seals*, 12-0293 (La. 10/26/12); 99 So. 3d 53 (Pet. App. E).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Fifth Circuit Court of Appeals entered its judgment on June 15, 2021, and denied Mr. Seals' petition for panel rehearing and rehearing *en banc* on July 13, 2021. Between March 19, 2020 and July 19, 2021, this Court extended the deadline to file a petition for certiorari to 150 days from the date of rehearing denial. *See* Supreme Court of the United States Order (March 19, 2021). This petition is timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI.

The Fourteenth Amendment provides in relevant part:

> No State shall . . . 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.

U.S. Const. Amend. XIV.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. §§ 2254(d) and (e)(1) of the Antiterrorism and Effective Death Penalty Act (AEDPA) provide, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Petitioner Glen Seals, a Black man, has been tried twice for the murder of Raymond Feeney, a White man, in 1993 and 2009. At his 1993 trial, Mr. Seals was convicted and sentenced to death by an all-White jury after the prosecution peremptorily struck one hundred percent of the potential Black jurors. In 2009, after the prosecution used five of its seven peremptory challenges to remove qualified Black jurors, Mr. Seals was convicted of second-degree murder and sentenced to life imprisonment without parole. Pet. App. D.

Jury Selection and Voir Dire

Jury selection for Mr. Seals' 2009 trial lasted three days,[1] and each day's pool contained 500 prospective jurors: one-third White, less than one quarter Black, and approximately fifteen percent non-specified or other race. Neither party exhausted its allotment of 12 peremptory challenges, as the trial court unexpectedly denied the use of back-strikes in violation of the state constitution. Pet. App. D at 15.

At the conclusion of the first panel, the parties exercised their peremptory challenges. Of the first twelve jurors, the State accepted over twice as many White

[1] The panel questioned on the first day was dismissed after a prospective juror made prejudicial comments.

jurors as Black jurors (six out of seven White jurors and two out of five Black jurors were accepted). The State used three of four peremptory challenges to remove Black jurors: Byron Davis, Esmaria Henry, and Edmond Bocage. Defense counsel objected to the three strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), and the trial court ruled that it did not believe a prima facie showing had been made.

Following the questioning of the second panel, the prosecution exercised a peremptory challenge against Sabrina Lewis, a Black woman, for a total of four challenges used against Black prospective jurors and two used against White prospective jurors. Defense counsel raised another *Batson* challenge. The prosecutor responded that "this is the person that said two stories is reasonable doubt." The trial court ruled that it was not finding a prima facie case because Ms. Lewis was almost excused for cause.

The State used a final peremptory challenge against another Black juror in that panel, Christopher Williams, bringing the total to five out of seven peremptory challenges on Black jurors. When the defense renewed its *Batson* challenge, the trial court stated that it was not going to find a prima facie case because Mr. Williams was challenged for cause and the trial court seriously considered granting the challenge. In all, the State used five of its seven peremptory strikes (71%) against Black prospective jurors, who as a group made up only 22% of the venire. Because of the way the strikes were exercised—allowing the State to first accept or reject each juror before the defense—the record makes clear that the State *accepted* eleven out of thirteen White jurors.

Other Relevant Circumstances

Beyond the prosecution's use of peremptory challenges to remove Black jurors at a disproportionate rate, other circumstances added to the inference of discrimination. This was a cross-racial crime prosecuted by a District Attorney's office that had recently been found to have discriminated in jury selection. *Snyder v. Louisiana*, 552 U.S. 472 (2008); *State v. Harris*, 01-0408 (La. 6/21/02); 820 So.2d 471. Mr. Seals was a 27-year-old Black man accused of murdering a 58-year-old White man in 1991. Mr. Seals was living in New Orleans, a majority-Black city, and the crime occurred in the predominantly White suburbs of Jefferson Parish. Crime rates in New Orleans were at an all-time high in 1991,[2] as were racial tensions. Additionally, this case arose during the summer when Jefferson Parish State Representative (and former Ku Klux Klan Grand Wizard) David Duke was running for governor.[3] Against this backdrop, the Jefferson Parish District Attorney's Office sought the death penalty for this cross-racial homicide. The prosecutor struck *all* of the Black potential jurors, trying Mr. Seals before an all-White jury, and in front of them, during opening statements, called Mr. Seals an "animal."

At the second trial, the prosecutor repeatedly called Mr. Seals a "thug," and remarking that "his expression [in court] says it all." The prosecutor in Mr. Seals' trial painted a picture of "givers and takers." Mr. Seals, he contended, was a "taker." Furthermore, at the time of Mr. Seals' trial, the Jefferson Parish District Attorney's

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[2] *Murder Rate for '91 is on a Record Pace*, TIMES PICAYUNE, March 1, 1991.
[3] Peter Applebome, *Duke: The Ex-Nazi Who Would Be Governor*, N.Y. TIMES, Nov. 10, 1991.

Office was engaging in racial discrimination in jury selection in other cases, and had demonstrated a pattern of disproportionate strikes against Black jurors. A statistical analysis report (the "Black Strikes Report") found that between 1994 and 2003, Jefferson Parish prosecutors used peremptory challenges to remove 55.5% of otherwise qualified Black jurors, but only struck 16.3% of White venire members. The same pattern emerged for six jury trials; prosecutors struck 59.3% of eligible Black venire members, but only 17% of White venire members.[4] The Black Strikes Report concluded that "there is a racial disparity in the state's use of peremptory challenges and that this disparity is highly significant," and cannot be attributed to chance. *Id*; *cf. Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (discussing the history of discrimination in a Texas DA's office).

Direct Appeal

On direct appeal, in the last reasoned decision on the issue, the state court of appeals engaged in a detailed analysis of the hypothetical reasons proffered by appellate counsel for the State in its briefing, and ultimately credited the reasons as race-neutral. Pet. App. D at 12. In evaluating these post-hoc reasons, the court

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[4] Richard Bourke, Joe Hingston & Joel Devine, Louisiana Crisis Assistance Center, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* (2003), *available at* https://capitalpunishmentincontext.org/files/resources/race/ BlackStrikes.pdf; *see Brief of Joseph DiGenova et al. as Amici Curiae, Foster v. Chatman*, No. 14–8349, 2015 WL 4624173, at *5; *Brief of Nine Jefferson Parish Ministers as Amici Curiae Supporting Petitioner, Snyder v. Louisiana*, 2007 WL 2605448, at *11 ("The data revealed that prosecutors used peremptory strikes to remove 55% of qualified African-American venirepersons, while peremptorily challenging only 16% of qualified white venirepersons.").

misattributed remarks made by a White seated juror indicating hostility to police, to a Black juror struck by the prosecution. *Id.* The court concluded that "the trial judge already knew why the State was using peremptory challenges to exclude [the Black jurors]." Pet. App. D at 13.

Habeas Proceedings Below

Having exhausted this claim in state court, Mr. Seals filed a timely Petition for Habeas Corpus under 28 U.S.C. § 2254 on June 13, 2016. On July 7, 2017, the Magistrate Judge issued a 148-page Report and Recommendation, recommending denial of relief. The district court issued a judgment on May 6, 2019, finding that the trial and appellate courts had unreasonably applied clearly established federal law by taking into account race-neutral reasons provided by the trial court and appellate prosecutors when it denied a prima facie case, rather than requiring the trial prosecutors to state their reasons and proceed to the second step of *Batson*. However, the district court went on to find that because the prima facie determination is a factual one, Mr. Seals had the burden of overcoming the § 2254(e)(1) presumption of correctness by clear and convincing evidence. The district court then proceeded to rely on still other reasons not discussed by the state courts in upholding the denial of a prima facie case. Pet. App. C at 5-6.

On September 11, 2019, Mr. Seals filed a Motion for Certificate of Appealability with the United States Fifth Circuit Court of Appeals. The Fifth Circuit granted the Motion on Mr. Seals' *Batson* claims on September 22, 2020. After hearing oral argument on April 29, 2021, the Fifth Circuit affirmed. Pet. App. A. The Fifth Circuit

found that precedent from this Court established that trial courts may consider voir dire answers of stricken jurors as a reason to deny a prima facie case, that a prima facie case of purposeful discrimination under the *Batson* framework is a factual finding subject to the § 2254(e)(1) presumption of correctness, and that Mr. Seals failed to establish a prima facie case. Pet. App. A at 6. On June 29, 2021, Mr. Seals filed a Petition for Panel Rehearing and a Petition for Rehearing *En Banc*. Both were denied on July 15, 2021. Pet. App. B.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Decide Whether, under *Johnson v. California*, a Court May Consider Potential Race-Neutral Reasons at the Prima Facie Stage.

This Court should grant certiorari to resolve the circuit divide on whether this Court's decision in *Johnson v. California*, 545 U.S. 162 (2005), allows the trial court to *sua sponte* provide race-neutral reasons for a prosecutor's peremptory strikes and then consider those reasons at the prima facie stage of a challenge made under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Like the petitioner in *Johnson*, Mr. Seals is a Black man convicted of a crime against a White person. The prosecutors in both cases struck three Black jurors, and when defense counsel raised *Batson* challenges, the trial court in both *Johnson* and the instant case dismissed the challenge and found no prima facie case based on the court's *own* consideration of the jurors' responses during voir dire and the fact that the jurors had been previously challenged for cause. *Johnson*, 545 U.S. at 166.

Courts across the country have interpreted *Johnson* to bar trial court consideration of "apparent race-neutral reasons for a prosecutor's strikes. *See Johnson v. Martin*, 3 F. 4th 1210 (10th Cir. 2021); *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004); *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004); *Truesdale v. Sabourin*, 427 F.Supp. 2d 451 (S.D.N.Y. 2006). The Fifth Circuit Court of Appeals is in the minority of circuits that allow trial courts to engage in judicial speculation in the first stage of the *Batson* inquiry, rather than moving on to the second stage wherein the State is required to provide its *actual* reasons. The Fifth Circuit's decision in denying

Mr. Seals' habeas relief conflicts with the interpretation of *Johnson* that many other federal courts have adopted, specifically that *Johnson* prohibits judicial speculation of race-neutral reasons at the prima facie stage. This interpretation is grounded in the text of *Johnson*, as well as in the low standard this Court has repeatedly emphasized for making a prima facie case of discrimination under *Batson*. Certiorari must be granted to resolve the circuit split and ensure uniformity in the application of this Court's precedent.

A. The Bar for Establishing a Prima Facie Case of Discrimination under *Batson v. Kentucky* Is Low.

Clearly established precedent from this Court has set in place a low burden at the prima facie stage of *Batson*. In *Johnson*, 545 U.S. at 170 (2005), this Court clarified that it "did not intend [*Batson's*] first step to be so onerous that a defendant would have to persuade the judge...that the challenge was more likely than not the product of purposeful discrimination." In order to make out a prima facie case, a defendant need only "[produce] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id*; *see also Purkett v. Elm*, 514 U.S. 765, 768 (1995) (noting that the first two steps of *Batson* only govern the production of evidence and that "[i]t is not until the *third* step that the *persuasiveness* of the justification becomes relevant.") (emphasis added).

A pattern of strikes used disproportionately against members of a certain race can on its own give rise to an inference of discrimination. *Batson*, 476 U.S. at 97; *see also Johnson v. Martin*, 3 F.4th at 1225-1226 (10th Cir. 2021) ("[A] prosecutor's

pattern of strikes against minority jurors is enough, on its own, to establish a prima facie case of discrimination."); *Taylor v. Jordan*, 10 F.4th 625, 646 (6th Cir. 2021) (finding that no fair-minded jurist could conclude that the defendant failed to raise an inference of discrimination where the prosecution used fifty percent of its peremptories to remove Black potential jurors even though they made up little more than fifteen percent of the venire); *Brinson v. Vaughn*, 398 F.3d 225, 235 (3d Cir. 2005) (deciding that the pattern of strikes was sufficient to establish a prima facie case where the prosecutor used thirteen peremptories against Black potential jurors); *Paulino v. Castro*, 371 F.3d 1083, 1092-1093 (9th Cir. 2004) (finding that "the excusal of five out of six Black jurors by means of five out of six peremptories" was enough to raise a plausible inference of discrimination).

At the prima facie stage, the trial court is not charged with deciding whether a peremptory challenge is more likely than not racially motivated. This Court's intention with the *Batson* framework has always been for the trial judge to have the benefit of all relevant circumstances, *including the prosecutor's explanation*, before making that decision. *Johnson*, 545 U.S. at 170. By mandating a low prima facie threshold, this Court paved the way for *Batson* challenges to proceed through the second and third steps of the framework, with the goals of transparency and confidence in the judicial system in mind.

B. Multiple Circuits Have Interpreted *Johnson* As Prohibiting Courts from Engaging in Judicial Speculation on Race-Neutral Reasons at the Prima Facie Stage of *Batson*.

The *Batson* framework is designed to produce actual answer to suspicions and inferences. *Johnson*, 545 U.S. at 172 (citing *Batson*, 476 U.S. at 97-98). Significantly, the trial court in *Johnson*, like the trial court in the instant case, had considered "apparent" reasons why the prosecution may have struck three Black jurors at the prima facie stage of the *Batson* analysis. *Johnson*, 545 U.S. at 165-66. This Court found that the "inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 172. On the same day this Court handed down the ruling in *Johnson*, this Court also held in *Miller El v. Dretke*, 545 U.S. 231, 252 (2005), that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis," and that the state court's substitution of a reason for eliminating a potential juror "does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions."

While these decisions indicate that race-neutral reasons coming from a judge are by their very nature hypothetical and collapse *Batson*'s three-step framework, federal courts have split on the issue. The Third, Ninth, and Tenth Circuits have made clear that a *prosecutor* needs to actually provide reasons because "speculation does not aid [a court's] inquiry into the reasons the prosecutor actually harbored for a peremptory strike." *Johnson*, 545 U.S. at 172. (citing *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (internal citations omitted)). The Seventh and First Circuits agree that *Johnson* has made clear that the inquiry at the prima facie stage is not extensive, but provides a very narrow exception to consider apparent reasons. And

the Fifth Circuit, in its ruling in Mr. Seals' case, has held instead that the ruling in *Johnson* itself is very narrow and only applies to the burden at the prima facie stage.

1. Three Federal Circuits Interpret *Johnson* as Establishing that Only the Prosecutor May Provide Race-Neutral Reasons

In *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004), the trial court evaluated each of the prosecutor's five (out of six) peremptories against Black jurors by *sua sponte* listing possible reasons for why the prosecutor could have struck them, and subsequently found no prima facie case of discrimination. The Ninth Circuit found this process to clearly contravene the structure laid out in *Batson*, calling out the court's offer of reasons as "speculation," and noting that "[i]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors...[w]hat matters is the *real* reason they were stricken." *Id.* at 1090. Following the decisions in *Johnson* and *Miller-El*, the Ninth Circuit continued to find that it was not enough that "the record would support race-neutral reasons for the questioned challenges" at step one because it is "the state's responsibility to create a record that dispels the inference" of discrimination at step two. The challenger does *not* have a responsibility to disprove every alternative at step one of *Batson*. *Williams v. Runnels*, 432 F.3d 1102, 1107 (9th Cir. 2006); *see also Gonzalez v. Brown*, 585 F.3d 1202, 1207 (9th Cir. 2009) ("[W]e will not supply a reason for the prosecutor to have exercised her strike because we cannot know what were her true motives."); *Johnson v. Finn*, 665 F.3d 1063, 1069 (9th Cir. 2011) (affirming that the mere existence of a possible reasonable premise "does not suffice to defeat an inference of racial bias at the first step of the

Batson framework"); *Currie v. McDowell*, 825 F.3d 603, 609 (9th Cir. 2016) (holding that a state appellate court violated clearly established federal law in its *Batson* prima facie analysis when it decided a challenge based on reasons that were not proffered).

The Third Circuit has agreed, finding, for instance, that a court looking to the voir dire transcript for information that might have motivated the prosecutor's decision beyond reasons stated on the record is speculation, which does not aid in the required inquiry of what reasons the prosecutor actually harbored. *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004). "Batson is concerned with uncovering purposeful discrimination... [and] 'apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge.'" *Id.* (citing *Riley v. Taylor*, 77 F.3d 261 (3d Cir. 2001)). In *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004), the Third Circuit found that a post hoc *Batson* evaluation of the record made by the Pennsylvania Supreme Court, wherein the court combed through the record itself looking for race-neutral bases for challenged strikes, was not an objectively reasonable application of *Batson*. By identifying and analyzing potential justifications on its own, the lower court had conflated *Batson's* first two steps. *Id.* at 256.

Most recently, the Tenth Circuit also interpreted *Johnson* to prohibit courts from engaging in judicial speculation at the prima facie stage. In *Johnson v. Martin*, 3 F.4th 1210, 1224 (10th Cir. 2021), the Circuit Court found an unreasonable

application of *Batson* where the trial court came up with its own race-neutral reasons for a prosecutor's strikes. The Tenth Circuit explained:

> Thus, when a trial court offers its own speculation as to the prosecutor's reasons for striking minority jurors, it essentially disregards its own core function under *Batson* – to evaluate the reasons offered by the prosecutor, including the prosecutor's demeanor and other contextual information, in order to determine the prosecutor's true intent. And in that regard, it matters not a whit that the trial court may have offered perfectly good reasons for striking the minority jurors.

Id.

While the Second Circuit has not ruled on this issue, lower federal courts in the Circuit have found that under *Johnson,* courts cannot offer reasons on behalf of prosecutors. *See, e.g., Vega v. Walsh,* 2010 U.S. Dist. LEXIS 40022, at *51 (E.D.N.Y. April 22, 2010) (noting that the *Batson* inquiry is not seeking an objective reason for a strike but rather looking at the prosecutor's subjective intent, and by providing reasons itself, the trial court "not only failed to provide a record of the prosecutor's actual reasons, he affirmatively muddied that record by providing a statement of reasons that he would find acceptable...thereby undermining the reliability of any later statement by the prosecutor."); *Truesdale v. Sabourin,* 427 F.Supp. 2d 451, 460 (S.D.N.Y. 2006) (finding the failure to require prosecutors to provide reasons could "undermine public confidence in the fairness of our system of justice, and thereby frustrate the public purposes *Batson* is designed to vindicate.").

2. Two Circuits Take a Mixed Approach in Allowing Trial Courts to Consider "Apparent" Reasons at the Prima Facie Stage

Other federal courts have not made a clear decision yet on the application of *Johnson*. The Seventh Circuit has taken a mixed approach. While the Seventh Circuit has found repeatedly that "*Johnson* limited the ability of appellate courts to consider, at the prima facie stage, the apparent reasons for the challenges discernible from the record," it allows an inquiry into apparent reasons when "the strikes are so clearly attributable to that apparent, non-discriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes." *Franklin v. Sims*, 538 F.3d 661, 666 (7th Cir. 2008). The Seventh Circuit makes clear that this exception is limited, consistently finding that courts should not have considered potential reasons, and that "[d]oing so risked collapsing all three of *Batson*'s steps into the prima facie inquiry." *Franklin*, 538 F.3d at 666; *see United States v. Stephens*, 421 F.3d 503, 516-518 (7th Cir. 2004) (concluding that a combination of the stricken jurors' encounters with law enforcement, criminal histories, and litigation histories was not enough to be an apparent reason). The First Circuit has taken a similar approach, considering "whether there are any 'apparent non-discriminatory reasons for striking potential jurors based on their voir dire answers.'" *Sanchez v. Roden*, 753 F.3d 279, 302 (1st Cir. 2014) (quoting *Aspen v. Bissonnette*, 480 F.3d 571, 577 (1st Cir. 2007)).

3. The Fifth Circuit is an Outlier in Ignoring *Johnson*'s Clear Mandate that Trial Courts Should Not Engage in Speculation Regarding a Prosecutor's Motives Behind a Strike

The Fifth Circuit is in the minority of courts that reads the decision in *Johnson* to not prohibit or limit judicial speculation. In the instant case, the Fifth Circuit panel dismissed this Court's ruling in *Johnson* as narrow and inapplicable, and further found that *Batson* does not prevent the trial court from considering the statements made by a struck panelist during voir dire in the prima facie stage. Pet. App. A at 9-10.

The sheer variation in interpretations of *Johnson*, *Batson*, and *Miller-El* regarding the ability of courts to speculate race-neutral reasons at the prima facie stage of the *Batson* inquiry requires this Court to weigh in on the proper application of its precedents. This is not an insignificant issue. The *Batson* framework is designed to protect against "[s]election procedures that purposefully exclude black persons from juries [and] undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Allowing racial discrimination to exclude qualified members of the juror pool "not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940) (footnote omitted). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Johnson*, 546 U.S. at 172.

C. Courts Have Also Interpreted This Court's Decision in *Williams v. Louisiana* as Further Clarifying the Decision in *Johnson*.

More recently, in *Williams v. Louisiana*, 136 S.Ct. 2156 (2016), this Court considered a case where the trial court had found no prima facie case because it considered the jurors' answers given during voir dire as part of the "relevant circumstances," under La. C.Cr.P. art.795. In a concurring opinion signed by four justices, Justice Ginsburg found that "Louisiana's rule, as the Louisiana Supreme Court has itself recognized, does not comply with this Court's *Batson* jurisprudence." *Id.* (Ginsburg, J., concurring) (citing La. C.Cr.P. art. 795). The Louisiana courts took this ruling as guidance on the proper way to interpret *Johnson*.

Following remand, the Louisiana court of appeal cited to Mr. Seals' own case in holding that the trial court's consideration of reasons apparent from the voir dire "falls within the ambit of considering 'all relevant circumstances' when determining whether, for purpose of step one, an inference of discrimination is established." *State v. Williams*, 13-0283 (La. App. 4 Cir. 9/7/16); 199 So.3d 1222, 1237-38. However, the Louisiana Supreme Court reversed. *State v. Williams*, 16-1952 (La. 11/13/17); 229 So.3d 455. Quoting *Johnson*, the court stated that "[t]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination

may have infected the jury selection process." *Id.* The prosecution subsequently conceded racial bias.[5]

This Court has repeatedly emphasized the low standard required to establish a prima facie case of discrimination under *Batson*. The *Batson* framework is being used every day in courthouses across the country; the existence of this much discrepancy in the application of the first step alone calls on this Court to step in—particularly in a jurisdiction where this Court has found repeated *Batson* violations. *See Flowers v. Mississippi*, 139 S.Ct. 2228 (2019); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008). "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process," *Flowers*, 139 S.Ct. at 2243, and uniformity is essential to maintaining trust in our judicial system as a whole, and thus, this Court must grant certiorari.

II. This Court Should Grant Certiorari to Resolve the Confusing Circuit Split on Whether the Prima Facie Issue in Batson Involves a Mixed Question of Law and Fact, and Is Thus Subject to Consideration under § 2254(d).

The Fifth Circuit decision in Mr. Seals' case found that the prima facie issue in *Batson* is a pure question of fact, rather than a mixed question of law and fact, and thus conflicts with opinions from the First, Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits. Even among Circuits that agree on the *nature* of the prima facie

[5] Matt Sledge, *New Orleans judge tosses murder conviction after prosecutors concede racial bias at trial*, June 19, 2021, available at https://www.nola.com/news/courts/article_74303952-d07b-11eb-906f-53f6983c92b7.html.

question, there is "substantial disagreement" over the standard of review under which prima facie cases are evaluated in federal court. *See Wheat v. United States*, 486 U.S. 153, 158 & n.2 (1988). This question has significant consequences in the habeas context, as it implicates whether a state-court decision denying a prima facie case is subject to § 2254(d), or, in some circuits, whether it is accorded the presumption of correctness under § 2254(e)(1).

This ongoing difference in opinion shows that "the question presented by this case is not only important, but...also...frequently arises." *See Perry v. Leeke*, 488 U.S. 272, 277 & n.2 (1989). This Court has not ruled on the standard of review to be applied to a ruling on step one of the *Batson* inquiry, and the Circuit Courts have taken note of the circuit split and are awaiting this Court's guidance. *See, e.g., United States v. Martinez*, 621 F.3d 101, 109 (2d Cir. 2010) (The Supreme Court "has not ruled on the standard of review to be applied to a ruling on step one of the *Batson* inquiry. Other circuits have split on the question, dividing on whether the determination is subject to clear error or de novo review."); *Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998) ("Although some of our sister circuits have utilized a clearly erroneous standard in their review...the Supreme Court's recent decision in *Ornelas v. United States*, 517 U.S. 690 (1996) points in the direction of de novo review."); *Saiz v. Ortiz*, 392 F.3d 1166 (10th Cir. 2004) (noting that some other circuits have held that *Batson* claims constitute mixed questions of law and fact for purpose of federal habeas corpus review). This Court must grant certiorari and intervene to resolve the split and answer the questions of (1) whether the prima facie issue in *Batson* involves a mixed

question of law and fact, and (2) whether a state-court ruling on the prima facie issue is subject to § 2254(d), or given the presumption of correctness under § 2254(e)(1). Doing so is essential to ensure consistency among the thousands of cases going into federal habeas every year.

A. Seven Circuits Hold That the Prima Facie Issue Is a Mixed Question of Fact and Law

A mixed question of law and fact is "one which has both factual and legal elements." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). To determine whether an issue presents a mixed question of law and fact, as opposed to a purely factual question, this Court must consider whether resolution of the issue "requires a court to determine the appropriate legal standard before applying that standard to the facts." *Smith v. Smith*, 976 F.3d 558, 561 (5th Cir. 2020). It is well-established that *Batson* and its progeny set forth a legal standard which the courts must apply to the facts in order to comport with the Fourteenth Amendment. The majority of circuits acknowledge that *Batson* issues broadly, and specifically, whether a prima facie case has been established, present mixed questions of law and fact.

The First, Second, Seventh, and Ninth Circuit hold that whether a prima facie case has been made is a mixed question of law and fact. *See Mahaffey*, 162 F.3d at 484 ("Unlike the ultimate issue of discriminatory intent, which as a factual question is entitled to deferential review, the preliminary question of whether a prima facie case has been shown presents a mixed question of law and fact..."); *Tolbert v. Page*, 182 F.3d 677, 681 n.6 (9th Cir. 1999) ("The prima facie inquiry involves a mixed

question of law and fact, because the court must determine whether the facts are sufficient to meet the requirements of the legal rule and, therefore, to proceed to the ensuing steps of the *Batson* analysis."); *U.S. v. Martinez*, 621 F.3d 101, 109-110 (2d Cir. 2010) (noting that while the trial court has heard the voir dire and observed demeanor, the inquiry into the prima facie case is not entirely factual because "the question of whether an inference of discrimination can be drawn is often more a question of law than fact."); *Sorto v. Herbert*, 497 F.3d 163, 171 (2d Cir. 2007) ("The existence of a prima facie *Batson* case is a mixed question of law and fact."); *United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994) (characterizing the prima facie determination as a mixed question of law and fact); *Crittenden v. Chappell*, 804 F.3d 998, 1006 (9th Cir. 2015); *U.S. v. Jordan*, 223 F.3d 676, 686 (7th Cir. 2000).

The Third and Sixth Circuits hold that *Batson* claims generally are mixed questions of law and fact. *See Braxton v. Gansheimer*, 561 F.3d 453, 458 (6th Cir. 2009) ("A *Batson* claim presents a mixed question of law and fact."); *Hardcastle v. Horn*, 368 F.3d 246, 254 (3d Cir. 2004) ("It is by now well-settled that *Batson* claims constitute mixed questions of law and fact for purposes of federal habeas corpus review.").

The Eleventh Circuit has acknowledged the legal nature of *Batson* rulings. *McGahee v. Alabama D.O.C.*, 560 F.3d 1252, 1261 (11th Cir. 2009) ("The [state court] decision was an unreasonable application of clearly established law because that court failed to follow clearly established law in the third step of Batson"); *U.S. v. Allen-Brown*, 243 F.3d 1293, 1296 (11th Cir. 2001) ("The application of the equal

protection principles enunciated in Batson to the exclusion of whites from a jury is an issue of constitutional law that is subject to plenary review.").

B. The Fifth, Eighth, and Tenth Circuits Hold that *Batson* Issues are Purely Factual

In contrast, only the Fifth, Eighth, and Tenth Circuit find *Batson* issues to be purely factual. *U.S. v. Matha*, 915 F.2d 1220, 1222 (8th Cir. 1990) (""The determination of whether the defendant has made a prima facie case under *Batson* and the determination of whether the government's explanation for its strikes is pretextual is a finding of fact..."); *Soria v. Johnson*, 207 F.3d 232, 238 (5th Cir. 2000) (characterizing the prima facie case as "a factual finding"); *Saiz v. Ortiz*, 392 F.3d 1166, 1175-77 (10th Cir. 2004) (claiming that *Batson* overall is a factual question); *see also Williams v. Cain*, 359 F. App'x 462, 465 n.2 (5th Cir. 2009) (acknowledging circuit split).

Whether the prima facie issue is a mixed question of law and fact or not is key to determining what standard federal courts use to review determinations of *Batson* stage one, and the inconsistencies across the circuits are concerning.

C. Even Among Circuits That Agree on Whether *Batson* Prima Facie Is Mixed Fact and Law, There Is Disagreement about the Applicable Standard of Review

Not only are the Circuit Courts split on whether the prima facie determination in *Batson* is a mixed question of fact and law, but they split even further on what standard of review applies. The confusion among the Circuit Courts must be resolved for there to be any sort of consistency in federal court outcomes across the country.

The Seventh Circuit has ruled that "whether a prima facie case has been shown presents a mixed question of law and fact...which the appellate courts should review de novo." *Mahaffey*, 162 F.3d 481, 484; *see also United States v. Jordan*, 223 F.3d 676, 686 (7th Cir. 2000) (clarifying *Mahaffey* and noting that while the standard of review for the third stage of *Batson* is clear error, because the prima facie determination presents a mixed question of fact and law, a *de novo* review must be conducted). According to the Seventh Circuit, this Court's decision in *Ornelas v. United* States, 517 U.S. 690 (1996), points in the direction of *de novo* review because the question of whether an inference of discrimination may be drawn from a set of undisputed facts relating to the racial makeup of the jury venire and the prosecutor's exercise of peremptory challenges is similar to the probable cause question this Court handled in *Ornelas. Mahaffey,* 162 F.3d 481, 484 (7th Cir. 1998). Because "factual scenarios" will recur, *de novo* review allows for "a measure of consistency in the treatment of similar factual settings" instead of allowing different trial courts "to reach inconsistent conclusions about the prima facie case on the same or similar facts." *Id.* However, since then, district courts in the Seventh Circuit have *also* held that the appropriate standard of review for a prima facie determination is whether the decision is unreasonable under 2254(d). *See United States ex rel. Pruitt v. Page*, 1999 U.S. Dist. LEXIS 13123, *15 (N. D. Ill. Apr. 5, 2000); *Pruitt v. McAdory*, 337 F.3d 921, 924 (7th Cir. 2003) (noting that the district court had found that the state court had unreasonable applied federal law by ruling that the defendant had failed to make out a prima facie case of discrimination).

The Second Circuit also finds the prima facie issue to be a mixed question of fact and law, but varies in its standard of review. Some cases are reviewed under the abuse of discretion standard. *Martinez*, 621 F.3d at 109-110. Other cases from the Second Circuit, however, have held that the state court ruling will only be disturbed if it is "contrary to, or involved an unreasonable application of clearly established Federal law." *Sorto v. Herbert*, 497 F.3d 163, 171 (2d Cir. 2007); *see also Overton v. Newton*, 295 F.3d 270, 276 (2d Cir. 2002) (noting that "[o]n federal habeas review, mixed questions of law and fact translate to 'mixed constitutional questions'" and are therefore subject to the standard in § 2254(d)(1)). While debating what standard of review ought to apply, the Second Circuit has also considered establishing a two-step review process to properly account for the mixed nature of the question. *Martinez*, 621 F.3d at 109-110. The First Circuit reviews the prima facie determination by state courts under the unreasonable application standard as well. *See Sanchez*, 753 F.3d at 297; *Scott v. Gelb*, 810 F.3d 94 (1st Cir. 2016).

Both the Third and Sixth Circuits, which have found *Batson* claims generally to be mixed questions, also review them in federal habeas under the unreasonable application standard. *Hardcastle*, 368 F.3d, at 254; *Braxton*, 561 F.3d at 458 ("Mixed questions of law and fact are reviewed under the unreasonable application prong of...AEDPA") (citing *Railey v. Webb*, 540 F.3d 393, 397 (6th Cir. 2008); *Moore v. Mitchell*, 708 F.3d 760, 800-801 (6th Cir. 2013)). In contrast, the Tenth Circuit, which finds *Batson* to be a purely factual question, found in *Saiz v. Ortiz*, F.3d 1166, 1175-1177 (10th Cir. 2004), that a state court decision "did not result in an unreasonable

determination of facts in light of the evidence presented nor did it unreasonably apply federal law." The Eleventh Circuit has found that step three of *Batson* is reviewed under the unreasonable application of clearly established federal law standard, although it has not clarified a standard for the prima facie determination. *McGahee v. Alabama D.O.C.*, 560 F.3d 1252, 1261 (11th Cir. 2009).

Meanwhile, the Ninth Circuit in a decision almost entirely citing cases regarding the *direct* review of trial court *Batson* prima facie determinations and explicitly criticizing the Seventh Circuit decision in *Mahaffey*, found that "review on habeas should certainly be no less deferential" than direct review and ruled that the standard was clear error on direct review and the statutory presumption of correctness in habeas. *Tolbert*, 182 F.3d at 685.[6]

The Fifth Circuit, as in Mr. Seals' case, has ruled that the prima facie case of purposeful discrimination is a factual finding entitled to the § 2254(e)(1) presumption of correctness. Pet. App. A at 6. However, even that ruling is not consistent across Fifth Circuit decisions, which have applied the standards in § 2254(d) and § 2254(e) indiscriminately. *See, e.g., Price v. Cain*, 560 F.3d 284 (5th Cir. 2009) (reviewing the state court decision on whether a prima facie showing was made under §§ 2254(d)(1) and (2)); *Williams v. Cain*, 359 Fed. Appx. 462 (5th Cir. 2009) (reviewing the state

[6] Notably, the dissent in *Tolbert* suggested a two-tier standard for reviewing a prima facie *Batson* determination: deferring to the trial court's factual findings concerning the *elements* of a prima facie case and then reviewing *de novo* whether the challenging party has raised a sufficient inference of discrimination to shift the burden of production. *Tolbert*, 182 F.3d at 686. McKeown, J., dissenting).

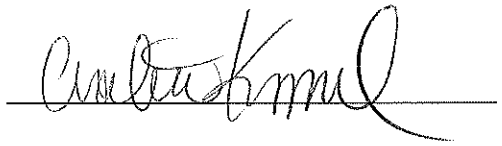
court's determination that a defendant failed to make a prima facie case under the standard in § 2254(e)).

It is unmistakable that there is extreme confusion over whether a prima facie issue is purely factual or a mixed question of fact and law and what standard of review applies, and moreover, that the rift between and within Circuits only continues to grow the longer this Court takes to step in. Leaving these issues unresolved allows the Circuits to operate under vastly different standards with no sense of coherency, promoting confusion, inefficiency, and leading to the application of inconsistent rules. This Court has made abundantly clear the importance of *Batson* and its progeny, and it must grant writ to provide guidance and settle the split.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to address the issues presented herein.

Respectfully submitted,



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