No.

IN THE

SUPREME COURT OF THE UNITED STATES

SANTONIO BYARS, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the Illinois Appellate Court erred where it did not find that the State's reason requesting the removal of two Black prospective jurors was a pretext for purposeful discrimination.

2) Whether intervention from this Court is needed to fulfill the promise of *Batson* by regulating *voir dire* so as to prevent the removal of prospective jurors where such removal has a discriminatory effect on a defendant's jury.

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On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

The petitioner, Santonio Byars, respectfully petitions this Court for a writ of *certiorari* to be granted to review the judgment of the Appellate Court of Illinois, Fourth District, affirming his conviction and sentence.

OPINIONS BELOW

The order of the Supreme Court of Illinois denying Santonio Byars' petition for leave to appeal is attached as Appendix A. The unpublished opinion of the Appellate Court of Illinois, Fourth District, affirming Santonio Byars' conviction is reported at 2021 IL App (4th) 200042-U, and is attached as Appendix B.

JURISDICTION

On November 3, 2021 the Illinois Appellate Court, Fourth District, affirmed Santonio Byars' conviction and sentence in an unpublished order. A petition for leave to appeal was timely filed and denied by the Illinois Supreme Court on January 26, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a). This petition is being filed in accord with this Court's Rule 13. U.S. S. Ct. R. 13 (2022).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

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

U.S. Const. amend. XIV, Sec. 1.

STATEMENT OF THE CASE

Santonio Byars, a Black man, was charged by the State with the second-degree murder of a white man, Tobby Buhs. Pet. App. 3a, 9a. Pursuant to the second-degree-murder statute under which Byars was charged, the State needed to prove beyond a reasonable doubt that at the time of the killing Byars believed the circumstances to be such that it would have justified or exonerated the killing, but his belief was unreasonable. 720 ILCS 5/9-2(a)(2) (Ill.) (2018). The occurrence witnesses who testified at trial for the State were white, and for the defense Black. Pet. App. 10a. The credibility and competency of the police witnesses were not issues in this case. Pet. App. 6a, 9a. Because Byars did not deny stabbing Buhs, the only issue in dispute for the jury to consider was whether Byars had stabbed Buhs based on a reasonable belief in self-defense, and therefore was not guilty of murder. Pet. App. 10a. Yet, the jury tasked with that consideration consisted of all white members after the trial court during *voir dire* removed the only two Black prospective jurors who had not been removed for cause at the State's request because those jurors held a "neutral" opinion of law enforcement. Pet. App. 3a-6a. Byars was convicted by that all-white jury of second-degree murder. Pet. App. 11a

Jury Selection

During jury selection, the State asked each prospective juror for their opinion regarding law enforcement. Pet. App. 3a-4a. In the first panel of veniremembers, one juror who had stated she held a "neutral" opinion of law enforcement was removed for cause because she indicated she could not be fair. Pet. App. 3a-4a. The State exercised its first peremptory challenge to remove a white male who answered that he held a

"neutral" opinion of law enforcement. Pet. App. 3a-4a. In that same panel, the State exercised its second peremptory challenge to remove a Black veniremember who had also answered that her opinion of law enforcement was "neutral." Pet. App. 3a-4a. Byars objected to the State's peremptory challenge because the veniremember was Black. Pet. App. 4a.

The State responded that it sought to remove the Black veniremember because she had a "neutral" opinion of law enforcement. Pet. App. 4a. The State noted that it had removed a white male for the same reason, and would have sought to remove the other veniremember who also held a neutral opinion had that person not been removed for cause. Pet. App. 4a.

The trial court noted that Byars had made a *prima facie* case of purposeful discrimination based on race. Pet. App. 4a. The court also found that the State gave a credible race-neutral reason for the exercise of the peremptory challenge and granted the State's request and excused the Black veniremember. Pet. App. 4a.

The State asked the next panel of prospective jurors their opinion of law enforcement. Pet. App. 4a. Two prospective jurors answered "neutral," and one answered "fine." Pet. App. 4a. One Black veniremember who had answered "fair," was excused for cause at the State's request because that juror stated he was on medication and that he did not believe he could follow the proceedings. Pet. App. 4a.

The State exercised its third peremptory challenge as to one of the prospective jurors, who had answered the law enforcement question with "neutral." Pet. App. 4a-5a. Again, Byars objected, noting that this veniremember was Black. Pet. App. 4a. The State noted that its position was to that it wanted any veniremember who answered

"neutral" to the law enforcement question to be excused. Pet. App. 4a-5a. The State proffered it was no secret it preferred jurors who held a positive view of law enforcement and presumed the defendant preferred those who did not. Pet. App. 4a-5a. The State advised the trial court that it asked the same question in every felony case it tried. Pet. App. 4a-5a. The court asked the State to clarify how a neutral view of law enforcement had anything to do with the matter, to which it responded it anticipated it would play video of Byars' interrogation during which Byars stated he fled the scene because he did not believe the police would treat him fairly. Pet. App. 5a. The State added more broadly that they like a juror who has a positive view of the police as law enforcement constitutes the majority of its witnesses, and is therefore always something the State believed was relevant. Pet. App. 5a.

The circuit court confirmed that no prospective juror from the first panel who gave the neutral answer was kept, though the court excused one for cause. Pet. App. 5a. The court summarized the parties had been presented with twenty-seven possible jurors, three of which were Black. Pet. App. 5a. One Black prospective juror was excused for medical issues, and another was excused due to the State's peremptory challenge. Pet. App. 5a. The court noted the State had been consistent seeking to excuse those who answered "neutral" as to their opinion of law enforcement. Pet. App. 5a. The court permitted the State to exercise its third peremptory challenge to excuse the last remaining Black prospective juror, who had a "neutral" opinion of law enforcement. Pet. App. 5a.

Once the selection process moved to choosing alternate jurors, Byars exercised a peremptory challenge to excuse one. Pet. App. 5a. The State then exercised a

peremptory challenge as to a white male who the State previously noted it would seek to remove for his "neutral" opinion of law enforcement. Pet. App. 5a.

The circuit court called more prospective jurors in, from which to select two alternates. Pet. App. 6a. The State proceeded with questioning each prospective juror about his or her general opinion of law enforcement. Pet. App. 6a. Several answered they held "neutral" opinions. Pet. App. 6a. One who was neutral remained as the first alternate as the parties had no remaining peremptory challenges for the first alternate. Pet. App. 6a. As to the second alternate, the State exercised a peremptory challenge to remove a white male prospective juror who advised he had a "neutral" view of law enforcement. Pet. App. 6a.

In summary, the circuit court permitted the State to exercise peremptory challenges to excuse five prospective jurors based on their "neutral" views of law enforcement. Pet. App. 6a. Three of these were white, and two were Black. Pet. App. 6a. The court also removed one Black prospective juror for cause on the motion of the State. Pet. App. 6a.

Trial and Sentencing

During Byars' trial, the State presented testimony from thirteen witnesses. Pet. App. 6ta. Three witnesses testified that on November 4, 2018, they were in a vehicle in which Tobby Buhs was the front seat passenger. Pet. App. 6a-7a. That vehicle stopped at a stop light next to a vehicle in which Byars was the front seat passenger, and which was driven by Byars' brother. Pet. App. 7a. Buhs challenged Byars' brother to a race. Pet. App. 7a, 9a. After Buhs' vehicle made it to the next stop light first, Buhs asked the occupants of the other vehicle for money, but the other vehicle drove away.

Pet. App. 7a. The driver of Buhs' vehicle followed. Pet. App. 7a.

The two vehicles arrived at a parking lot where Buhs got out of his vehicle and began arguing with Byars, who had also got out of his vehicle. Pet. App. 7a-8a. Byars and Buhs came into contact with each other, after which Buhs said he needed to go to the hospital because he had been stabbed. Pet. App. 7a-8a. Buhs was carrying a pocket knife in his pants. Pet. App. 9a.

Tobby Buhs died of a stab wound to his chest. Pet. App. 8a-9a. Buhs also had a second stab wound on his right forearm. Pet. App. 8a-9a.

Detectives interviewed Byars on December 13, 2018. Pet. App. 9a. A video recording of that interview was shown to the jury. Pet. App. 9a. During the interview, Byars felt that since Buhs and the driver of the vehicle that followed Byars' brother's vehicle were white, and Byars and his brother were Black, the other driver and Buhs must have had firearms, which gave them the confidence to follow Byars. Pet. App. 10a. Byars only took out the knife he carried on his person after he saw Buhs "fiddling with his pocket." Pet. App. 9a-10a.

Byars said that Buhs ran at him, but Byars pushed him back. Pet. App. 9a-10a. Buhs fell, and when he got back up, Byars saw something in his hand. Pet. App. 9a-10a. Buhs ran at Byars again and swung at him, at which point Byars stabbed Buhs once in the arm. Pet App. 9a-10a. Buhs then walked away saying that he had been stabbed, and Byars saws Buhs put something in his pocket. Pet. App. 9a-10a.

Byars' brother testified that he saw Buhs run at Byars, retreat, and then run at Byars again. Pet. App. 10a. Byars did not testify. Pet. App. 11a. The jury rejected Byars' argument that he had acted in reasonable self-defense, and found Byars guilty

of second-degree murder. Pet. App. 11a.

Byars filed a motion for a new trial, arguing the circuit court erred by allowing the State to exercise two of its peremptory challenges to excuse two Black prospective jurors. Pet. App. 12a. At the hearing on the motion, Byars argued he was "deprived of having any jurors of color on the jury panel." Pet. App. 12a. Byars argued having people of color was important as they would understand such things as why Byars was afraid to come to the police. Pet. App. 11a. The circuit court denied Byars' motion. Pet. App. 11a.

Byars was sentenced to ten years of incarceration. Pet. App. 11a.

Direct Appeal

On direct appeal, Byars argued that the circuit court erred by permitting the State to exercise two of its peremptory challenges to remove Black prospective jurors, who said they had "neutral" opinions of law enforcement. Pet. App. 15a. Byars argued that the State's questions asking for prospective jurors' opinions of law enforcement was a pretext for purposeful discrimination. Pet. App. 15a. Byars also argued that the removal of the Black prospective jurors based on their "neutral" opinions of law enforcement violated Byars' right to the equal protection of the laws. Pet. App. 17a-18a.

In its decision, the Illinois Appellate Court would not make the "leap" from Byars' contention that because people of color are disproportionately subjected to police interference – and thus they will more likely possess a neutral view of law enforcement, to his argument that the State's reliance on a prospective juror's answer of "neutral" to a question asking about the juror's opinion of law enforcement was not

race-neutral, and, instead, was a pretext for unlawful discrimination. Pet. App. 17a.

The Appellate Court found that the trial court was in the best position to evaluate the credibility of the prosecutor's stated reason to remove the jurors as not a pretext for purposeful discrimination. Pet. App. 17a. The Appellate Court also held that the removal of the Black prospective jurors based on their "neutral" opinions of law enforcement did not violate Byars' right to equal protection. Pet. App. 17a-18a.

Byars' timely filed petition for leave to appeal the Appellate Court's decision was denied by the Illinois Supreme Court. Pet. App. 1a.

REASONS FOR GRANTING CERTIORARI

I. The Illinois Appellate Court erred where it did not find that the State's reason requesting the removal of two Black prospective jurors was a pretext for purposeful discrimination.

During jury selection at Santonio Byars' trial, the only two Black prospective jurors who had not been removed for cause were challenged by the State because those two jurors stated that they held a neutral opinion of law enforcement. After objection by Byars' counsel, the trial court conducted a three-step *Batson* hearing, and ruled that Byars had not shown that the State acted with purposeful discrimination in challenging the Black prospective jurors, and the court granted the State's challenges. In its opinion, the Illinois Appellate Court affirmed the trial court's ruling. Nevertheless, the Appellate Court erred where it did not recognize that the State's reason to remove the two Black prospective jurors was a pretext for purposeful discrimination. Thus, this Court should grant this petition to remedy the constitutional violation that Byars suffered.

In *Batson v. Kentucky*, this Court recognized that "[t]he State denies a Black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." 476 U.S. 79, 85 (1986). This Court then created a framework to ensure that equal protection rights are upheld. *Batson*, 476 U.S. at 85, 93-98; U.S. Const., amend. XIV. Thirty-three years later, this Court underscored the importance of *Batson,* saying that it had "ended the widespread practice in which prosecutors could routinely strike all black prospective jurors in cases involving black defendants." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019). The

Flowers Court exalted the steps *Batson* took to "eradicate racial discrimination from the jury selection process." The *Flowers* Court, following *Batson,* also desired to protect the rights of both defendants and jurors, and to further public confidence in criminal justice system by ensuring fairness. The *Batson* framework revolutionized the typical jury selection process taking place in criminal courtrooms throughout the United States. *Flowers*,

S. Ct. at 2242-43.

In the first step of the *Batson* framework, the defendant bears the burden of making out a *prima facie* case that the State exercised peremptory challenges in a discriminatory manner. *Batson*, 476 U.S. at 93-94. In the second step, the burden shifts to the State to provide a race-neutral basis for the peremptory strikes. *Batson*, 476 U.S. at 94. "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers,* 139 S. Ct. at 2243. In the third step of the *Batson* inquiry, the court determines whether the defendant has shown that the State engaged in purposeful discrimination on the basis of race. *Batson,* 476 U.S. at 98. Implausible or fantastic justifications to remove a juror may, and probably will, be found to be pretexts for purposeful discrimination. See *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

Here, after the trial court determined Byars had made a *prima facie* showing of purposeful discrimination after the State exercised peremptory challenges on the only two Black prospective jurors who had not been removed for cause, the State proffered that it had exercised challenges on these possible jurors because they had expressed

a "neutral" opinion of law enforcement. Pet. App. 4a-6a. The State proffered that it exercised peremptory strikes on all jurors who expressed a less than positive view on law enforcement regardless of the juror's race. Pet. App. 4a-5a. Yet, the State did not remove a juror who stated that law enforcement was "fine." Pet. App. 4a.

Further, the State explicitly stated that it preferred jurors who held a positive view of law enforcement, and the State asked potential jurors their opinion of law enforcement in every felony case it tried. Pet. App. 4a-5a. Yet, whether the police should have been liked or disliked was not made an issue by either side in Byars' case. Here, no police officer was an occurrence witnesses, and the interview of Byars by police was recorded and played for the jury. Pet. App. 6a, 9a. Hence, because the State did not remove a juror who said police were "fine," and the likableness of the police was not an issue in this case, the reason the State gave for the importance of its question regarding prospective juror's opinions of police was implausible and a pretext to remove jurors because of their race.

This case is similar, in another aspect, to *Flowers*. 139 S. Ct. at 2243-44. There, this Court found that, in combination with a history of *Batson* violations, the record in *Flowers* showed that the prosecutor's office struck at least one prospective juror motivated by discriminatory intent. This Court parsed out the State's intent by comparing the prospective jurors who were struck to those who were not. See *Id.* at 2248. In performing this analysis this Court stated, "[w]hen a prosecutor's 'proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.'" *Id.* at 2248-49 (quoting *Foster v. Chatman*,136 S. Ct. 1737,

1754 (2016)). This Court also noted that the defendant is not required to identify an *"identical"* white juror when making this comparison. *Id.* at 2249 (emphasis in original).

In this case, the State struck two Black prospective jurors – who held neutral opinions of law enforcement – and did not strike one similarly situated white juror – who thought law enforcement was "fine." This side-by-side comparison of the two Black prospective jurors to the white prospective juror, whom the State accepted to serve on Byars' jury, cannot be considered a fluke, especially when considering the strike in context.

Here, both the trial and appellate courts failed Santonio Byars. Both courts misunderstood the nature of the discrimination within the State's purported reason to strike two Black prospective jurors, and both courts misunderstood the *Batson* violation.

A neutral explanation by the State of why the State seeks to remove a juror means an explanation based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). A prosecutor's explanation will be deemed not race neutral if a discriminatory intent is *inherent* in the prosecutor's explanation or the reason offered. *Id.*

Here, the State claimed it struck all of the veniremembers who expressed any opinion of law enforcement that was not positive or respectful. Pet. App. 4a. Further the State made it no secret that it wanted jurors who held a positive opinion of police. Pet. App. 4a-5a. Yet, despite challenging two Black prospective jurors who held a neutral opinion of law enforcement, the State did not challenge a white juror who

stated that law enforcement was "fine." Pet. App. 4a-5a. Thus, the State's proffer was a pretextual explanation that naturally should have given rise to an inference by the trial and appellate courts of the State's discriminatory intent. *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

Further, when one considers that people of color are disproportionately subjected to more police interference than whites, people of color, understandably, may hold a neutral view of law enforcement. See *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (noting that it is no secret that people of color are disproportionate victims of unconstitutional police conduct). Hence, discriminatory intent was inherent in the prosecutor's reason to exclude the two prospective Black jurors. See *Miller–El v. Dretke*, 545 U.S. 231, 252 (2005)) (noting the "pretextual significance" of a "stated reason [that] does not hold up"). Considering the whole of the jury selection proceedings in this case casts the State's reasons for striking two Black prospective jurors in an implausible light. Comparing the State's strikes of those two Black prospective jurors with the treatment of a white panel member who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.

In this case, Santonio Byars, a Black defendant, claimed self-defense in the killing of a white man. Pet. App. 9a-10a. The fear Byars felt as a Black man being chased by a car occupied by multiple white men, and then attacked by a white man who also possessed a knife, was relevant in the jury's analysis on the various ways cross-racial actions, questions, and answers may be subject to misunderstanding and confusion. Pet. App. 9a-10a. There were cross-racial State and defense witnesses, and

importantly, although the integrity of law enforcement was not an issue, the State exercised peremptory challenges on all jurors who expressed a less than favorable opinion of law enforcement. Pet. App. 3a-6a, 9a. Those peremptory challenges resulted in the only two remaining Black venire members, after others were removed for cause, being removed from Byars' jury, which caused disproportionate harm to Byars by denying him jurors of his race to deliberate on those cross-racial issues. This was the State's true intent when it challenged those two Black prospective jurors.

Hence, because race was a factor in Byars' case from the very inception – he was a Black man who had killed a white man in either reasonable or unreasonable self-defense – the trial and appellate courts should have recognized that the supposed race-neutral reason that the State gave to remove two Black prospective jurors was pretextual.

Byars seeks for this Court to hold that his constitutional right to the equal protection of the law was violated when the only remaining Black jurors were removed from his jury. This Court should conclude that the State's reason for which those jurors were removed in this case was an implausible and fantastic justification, and was inherently a pretext for the State's discriminatory intent. By granting *certiorari* this Court can reiterate and strengthen the protections it has set forth in *Batson* and *Flowers*, and allow the violation of Byars' constitutional rights to be remedied by ultimately granting him a new trial.

II. Intervention from this Court is needed to fulfill the promise of *Batson* by regulating *voir dire* so as to prevent the removal of prospective jurors where such removal has a discriminatory effect on a defendant's jury.

During jury selection at Santonio Byars' trial, the only two Black prospective jurors not removed for cause were removed by the trial court after the State's peremptory challenges because those jurors held a neutral opinion of law enforcement. Byars, a Black man on trial for killing a white man, objected to the removal of those jurors and argued that their removal deprived him of having any jurors of color on his jury. The Illinois Appellate Court found that the State had not acted with discriminatory intent, and therefore ruled that the trial court did not err by removing those two jurors. Here, however, the State's reason for challenging those two Black prospective jurors had a discriminatory effect on Byars' jury. Therefore, this Court should grant this petition to intervene and fulfill the promise of *Batson* by regulating *voir dire* as to prevent the removal of prospective jurors where such removal, as here, has a discriminatory effect on a defendant's jury.

A) *Batson's* focus on discriminatory intent has proved ineffective, and states are now expanding the *Batson* framework to include discriminatory effect by regulating *voir dire*.

Peremptory challenges predate our Constitution, but they are not constitutionally required. See *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("We have long recognized that peremptory challenges are not of constitutional dimension."). What is constitutionally required is that a Black defendant is afforded equal protection of the laws by being put on trial before a jury from which members of his race have not been purposefully excluded. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). Though

peremptories were developed as a means of ensuring impartiality, practically peremptories are used by litigators to gain partiality in the final jury. See April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 Stan. J. of Civ. Rts. & Civ. Liberties 1, 31 (2020) (noting that "American attorneys generally [have] two goals in jury selection: to eliminate potential bias and to build up potential affinity"). Therefore, while peremptories might be an irresistible tool for trial tacticians, it is exceedingly difficult to argue that the practice of striking jurors who pass a challenge for cause is consonant with the constitutional imperative of ensuring that a defendant's right to the equal protection of the law is not violated by excluding jurors of the same race as the defendant. Thus, because peremptory challenges are not of constitutional dimension, when presented with a challenge that explicitly, implicitly, or unconsciously involves race, courts should err on the side of ensuring that a defendant is afforded equal protection of the law and deny the challenge rather than, at the least, bolstering the State's tactical advantages by granting a challenge of a particular juror, or at the most, condoning a State's challenge that has a discriminatory effect on the racial makeup of a defendant's jury.

There can be no doubt that race-based peremptory strikes were obvious and rampant well into the latter half of the twentieth century, an odious situation that this Court repeatedly observed and attempted to remedy in *Batson v. Kentucky*, 476 U.S. 79 (1986). When this Court handed down its ruling in *Batson*, Justice Thurgood Marshall lauded the "historic step," but expressed his doubts that the three-step framework would actually "eliminat[e] the shameful practice of racial discrimination

in the selection of juries." 476 U.S. at 102. Marshall was specifically concerned about the ease with which prosecutors would be able to craft facially-neutral reasons for their strikes and the degree to which "unconscious racism" would remain out of reach of *Batson* challenges. *Id*. at 106. Justice Marshall's concerns have materialized.

The burden prosecutors must meet to defend a challenged strike is shamefully low, and courts routinely accept proffered reasons that are silly, superstitious, implausible at best, and baldly bigoted at worst. See *Purkett v. Elem,* 514 U.S. 765, 768 (1995); see also Robin Walker Sterling, *Through a Glass, Darkly: Systemic Racism, Affirmative Action, and Disproportionate Minority Contact*, 120 Mich. L. Rev. 451, 498 (2021). And, appellate courts give considerable deference to trial court judges, all but rubber stamping "flimsy justification[s]." *United States v. Clemons*, 892 F. 2d 1153, 1162 (3d Dist. 1989) (J. Higginbotham concurring). But, most disturbingly, courts allow strikes based on reasons that disproportionately affect jurors of color. For example, the Second Circuit upheld a peremptory strike against a Black venire member based on the newspaper he read – a Black-owned newspaper geared towards the Black community. *United States v. Lee*, 549 F.3d 84, 94 (2d Cir. 2008). That explanation may be ostensibly neutral but, given the paper's intended audience, would disproportionately implicate race. Similarly, a prosecutor in Alabama gave as his reason for striking several Black venire members that the potential jurors were affiliated with a predominately Black university; this was deemed a race-neutral explanation. *Scott v. State*, 599 So. 2d 1222, 1227-28 (Ala. Crim. App. 1992), *cert. denied*, 599 So. 2d 1229 (Ala. 1992).

One common reason for exclusion that is particularly offensive to the purpose

of *Batson* is striking jurors of color based on prior arrests or arrests of friends and family. *See generally*, Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pol'y Rev. 387 (2016). Because people of color are far more likely to be arrested in this country than their white counterparts, these strikes create "a deliberately whiter jury," thereby perpetuating the very evil that *Batson* was designed to prevent. *Id.* at 390. Indeed, pretextual questions like those about prior arrests have allowed racial discrimination in jury selection to go largely unchecked, despite *Batson's* efforts to the contrary. And accepting those questions as race-neutral is to turn a blind eye to the glaring racial disparities in our criminal justice system. See *Id.* at 394. Yet, *Batson's* seemingly rigid focus on *purposeful* discrimination all but promises this result.

Whether because they are loathe to attach the label of "purposeful discrimination" to colleagues – effectively accusing them of being dishonest and racist – or because the reason does not seem intentional enough to warrant action, courts are quick to accept proffered explanations, so long as lawyers do not explicitly cite race. See *Id.* at 403. Indeed, as numerous studies and analyses demonstrate, "[n]o evidence of bias has been too blatant for state courts to ignore." Brian A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 Wash. & Lee L. Rev. 509, 523 (1994). One statistical analysis showed that prosecutors strike black jurors at 175 percent the expected rate based on the makeup of the venire. Thomas W. Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1626 (2019). A recent study in Mississippi, covering 25 years of data, found that Black venire members were four times more likely to be struck than their white counterparts. Will

Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, APM Reports 6 (2018)(available at https://features.apmreports.org/files/peremptory_strike_methodology.pdf). Data from North Carolina showed that, even when controlling for factors unrelated to race, Black venire members were more than two times as likely to be successfully struck as did members of other races. Vida B. Johnson, *supra* at 403. And a statistical analysis out of Philadelphia showed that *Batson* has "had no effect whatsoever on prosecutorial strikes against Black venire members." David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 73 (2001).

In this way, the aftermath of *Batson* has been analogous to the aftermath of *Strauder v. West Virginia*. 100 U.S. 303 (1880). After this Court prohibited laws barring Blacks from serving on juries, jurisdictions utilized other "discriminatory tools to prevent Black persons from being called for jury service." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2239 (2019); see also Benno C. Schmidt Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1406 (1983) (noting that, post-*Strauder*, "the systematic exclusion of Black men from Southern juries was about as plain as any legal discrimination could be short of proclamation in state statutes or confession by state officials"). In short, courts complied with the text of *Strauder*, but not the spirit of it. In much the same way, racially-based peremptory strikes post-*Batson* have taken a more covert form: avoiding any express reference to race. Indeed, any limitation imposed by *Batson* is easily circumvented by a facially race-neutral justification. Judge Mark W. Bennett, *supra* at 161.

That a suspect question or peremptory strike is not coming from a place of overt racism does not make it non-discriminatory, though. Rather, even when these practices derive from implicit biases, they are equally as offensive to the aims of *Batson,* and equally as detrimental to the integrity of the judiciary. See *Miller-El*, 545 U.S. at 238 (noting that "the very integrity of the courts is jeopardized" when jurors of color are discriminated against); *c.f. Hopkins v. Price Waterhouse,* 825 F.2d 458, 469 (D.C. 1987), *overruled on different grounds,* (emphasizing that "unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination"). And just as with the exclusion of Black people from grand juries and venires in *Norris v. Alabama*, "it is [this Court's] province to inquire not merely whether [a Constitutional right is] denied in express terms but also whether it [is] denied in substance and effect." 294 U.S. 587, 590 (1935).

Implicit biases – those that are "unstated" or perhaps even "unrecognized" – are "pervasive and powerful" in our society and in our criminal justice system. Judge Mark W. Bennett, *supra* at 152. Indeed, members of this Court have recognized as much. *See Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg & Breyer, JJ., concurring) ("It is well documented that conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals."); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is clear by now that conscious and unconscious racism can affect the way white jurors perceive minority defendants . . ."). Lower courts have also acknowledged the power of implicit biases. See*, e.g.*, *United States v. Drakeford*, 992 F.3d 255, 267 (4th Cir. 2021) (recognizing that "an increasingly vast psychological literature" points to implicit biases as the root of a

"substantial portion of the racial profiling that occurs in modern policing") (internal quotations omitted); *United States v. Raygoza-Garcia*, 902 F.3d 994, 1003 (9th Cir. 2018) (recognizing that "innocuous factors" that apply disproportionately to minorities may implicate implicit racial biases); *United States v. Mateo-Medina*, 845 F.3d 546, 553 (3d Cir. 2017) (recognizing the role that implicit biases play in arrests of people of color); *United States v. Ray*, 803 F.3d 244, 259-60 (6th Cir. 2015) (recognizing the "proven impact of implicit bias on individuals' behavior and decision-making"). By focusing solely on explicit biases, then, the *Batson* framework largely ignores the possibility of implicit biases infiltrating the jury selection process. As a result, discriminatory peremptory strikes persist.

Seeking to fulfill the promises of *Batson*, states have adopted a wide range of approaches including reinventing the *Batson* framework or getting rid of peremptory strikes entirely.

In 2018, after acknowledging that "racial discrimination remains rampant in jury selection," the Washington Supreme Court promulgated a court rule, GR37, that fundamentally expanded the protections of *Batson*. *State v. Saintcalle*, 309 P.3d 326, 329 (Wash. 2013) (en banc). First, the rule replaced *Batson's* necessary finding of purposeful discrimination – recognizing "implicit, institutional, and unconscious biases' – and prohibits peremptory strikes if "an objective observer court view race or ethnicity as a factor in the use of the peremptory challenge." Wash. Gen. R. 37(e), (f). Second, the rule creates a list of seven reasons which are considered presumptively invalid for peremptory strikes, including, such as in this case, a juror expressing a distrust of law enforcement because these reasons have been historically associated with improper

discrimination in jury selection. Wash. Gen. R. 37(h), (i).

The Washington Supreme Court further demonstrated its commitment to this rule in *State v. Jefferson*, where it explicitly replaced the third step in *Batson* with the objective observer inquiry. 429 P.3d 467, 470 (Wash. 2018) (instructing that, when a *Batson* challenge proceeds to the third step, "the trial court must ask whether an objective observer could view race or ethnicity as a factor in the use of the peremptory strike"). The *Jefferson* court also established that review of this determination would be *de novo*, departing from *Batson's* highly deferential standard of review. *Id.* at 480.

Borrowing language from Washington, a new law went into effect in California in 2021, replacing *Batson's* "purposeful discrimination" requirement with an objective standard: "whether there is a substantial likelihood that an objectively reasonable person would view race . . . as a factor" for the peremptory challenge. Cal. Civ. Proc. Code § 231.7(d)(1) (2021). The California legislature recognized that disproportionate exclusions of minorities from jury service persist and that the existing procedure (*i.e.*, the *Batson* framework) "has failed to eliminate discrimination." Cal. Civ. Proc. Code § 231.7 (2020 Cal. Legis. Serv. Ch. 318, Sec. 1(b) (A.B. 3070) (WEST)) The legislature specifically pointed to *Batson's* requirement of intentional bias as the reason the procedure is ineffective, noting that "many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups." *Id*.

Accordingly, the law attempts to remedy "unconscious bias" by identifying thirteen presumptively invalid reasons for exclusion, including expressing a distrust of law enforcement. Cal. Civ. Proc. Code § 231.7(e), (f). The presumption of bias can

only be overcome by "clear and convincing evidence that an objectively reasonable person would view the rationale as *unrelated*" to a protected class. Cal. Civ. Proc. Code § 231.7(e), (f) (emphasis added).

In August 2021, the Arizona Supreme Court adopted court rule changes effectively evading the *Batson* framework by eliminating peremptory strikes altogether. Press Release, *Ariz. Sup. Ct., Arizona Supreme Court Eliminates Peremptory Strikes of Jurors* (Aug. 30, 2021) (available at https://www.azcourts.gov/Portals/201/Press%20Releases/2021/083021Jury.pdf). Further, at least four other states are actively evaluating expanding the protections of *Batson* to fulfill its promise. See *State v. Holmes*, 221 A.3d 407, 429 (Conn. 2019); North Carolina Task Force for Racial Equity in Criminal Justice 4 (2020) (available at https://ncdoj.gov/wp-content uploads/2021/02/TRECReportFinal_02262021.pdf); S.B. 918, 192nd Cong. (Mass.)(as referred to Judiciary Comm. Mar. 29, 2021); S.B. S6066, 2021 Reg. Sess. (N.Y.)(as referred to Codes Comm. Jan. 5, 2022). Two other states have also recognized the future need to fulfill the promise of *Batson* by reforming peremptory challenges so as to end the disproportionate removal of persons of color from juries. See *State v. Veal*, 930 N.W.2d 319, 340, 362 (Iowa 2019); *State v. Aziakanou*, 498 P.3d 391, 406 (Utah 2021).

In sum, the landscape of *Batson* challenges is in an ever-growing state of change, leaving defendants subject to vastly different protections based solely on geographic location. As a result, the effectiveness of the constitutional guarantee of *Batson* – a prohibition on discriminatory peremptory strikes – has become entirely dependent on the defendant's zip code. In the instant case, Byars' jury would have included two Black

jurors had *voir dire* been conducted in the State of Washington, for example, rather than in Illinois. Instead, he was convicted by an all-white jury.

B) This case provides this Court with a vehicle to expand *Batson* and fulfill its promise.

Because of the landscape of *Batson* challenges is in an ever-growing state of change amongst the States, here, this Court should grant certiorari to establish a cohesive approach to the constitutional guarantees of *Batson*; it should instruct lower courts to consider implicit or non-purposeful discrimination during a *Batson* challenge and it should explicitly regulate *voir dire* to eliminate the removal of jurors that would have a discriminatory effect on a defendant's jury.

In this case, even if the trial and appellate courts were unwilling to label the peremptory strikes "purposeful," the implicitly discriminatory effect of the reasons for the State's strikes were evident. Pet. App. 15a-17a. The proffered reason for excusing the only Black venire members not excused for cause in this case was that they had "neutral" opinions of law enforcement, yet the integrity of law enforcement was not an issue in this case. Pet. App. 3a-6a, 9a-10a. Just like arrest records, opinions of law enforcement are tainted by the disparate treatment of minorities by law enforcement. Not only are people of color significantly more likely to be arrested and incarcerated, but they are more likely to be stopped by the police. *See* Vida B. Johnson, *supra* at 391-93. While there are no national statistics, local studies show massive racial disparities in stops and use of force. Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. Chi. L. F. 485, 485 (2016). And police stops, even when they do not lead to arrests, often generate "resentment, fear, and a sense of physical restraint." Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002

U. Chi. Legal F. 163, 213 (2002). It is not surprising, then, that jurors of color would be disproportionately more likely to hold neutral or negative views of law enforcement. See Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Rsch. Ctr. (Sep. 29, 2016) (available at https://www.pewresearch.org/social-trends/2016/09/29/the-racial-confidence-gap-in-police-performance/) (finding that Blacks were half as likely as whites to have a positive view of local police). Hence, by always challenging all jurors who held a neutral opinion of law enforcement – as here the State admitted it did in every felony case it tried (Pet. App. 5a) – the State could effectively remove most, if not all Black jurors – as in this case.

The Illinois Appellate Court held that Byars had waived the argument on appeal that the removal of the two Black prospective jurors based on their "neutral" opinions of law enforcement was violative of Byars' right to equal protection of the law, and also found that no error had occurred. Pet. App. 17a-19a. Yet, Byars' counsel contemporaneously objected to the removal of the two Black prospective jurors, and argued in his post-trial motion that the removal of those two jurors "'deprived him of having jurors of color on the jury panel,'" thus the removal had a discriminatory effect on Byars' jury. Pet. App. 3a-6a, 11a. Further, racial discrimination in jury selection offends the Equal Protection Clause of the United States Constitution. *Batson*, 476 U.S. at 85. Thus, this argument was not waived.

The harm of the discriminatory effect that occurred here can be confirmed where mock jury experiments have shown that racial diversity in the jury alters deliberations. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1180 (2012). When comparing the experimental mock jury deliberation content

of all-white juries with that of racially diverse juries, it was found that racially diverse juries processed information in a way that most judges and lawyers would consider desirable. *Id*. Racially diverse juries had "longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer uncorrected statements, and greater discussion of race-related topics." *Id*., at 1180-81. In addition to these information-based benefits, the experiments showed that by jurors knowing that they would be serving on diverse juries (as compared to all-white ones), white jurors were less likely to believe, at the conclusion of evidence but before deliberations, that a Black defendant was guilty. *Id*., at 1181. Thus, in this case where a Black man argued he killed a white man in self-defense, and where the State and defense witnesses were cross-racial, it was even more important for Byars to have people of color on his jury, and the removal of all jurors who held a neutral opinion of law enforcement deprived him of that significant right.

Yet, here, the Appellate Court refused to acknowledge the causal relationship between the reality that people of color are disproportionately subjected to police interference and so are thus more likely possess a neutral view of law enforcement. Pet. App. 17a. The Appellate Court further dismissed Byars' argument that it was pretextual unlawful discrimination to dismiss a prospective juror based on an answer of "neutral" to a question asking about the juror's opinion of law enforcement. Pet. App. 17a. This Court should recognize that a court's acceptance of a "race-neutral" justification without acknowledging the realities of the world in which that justification is given, is comparable to wilful blindness. Thus, just as the *Flowers* Court extended the scope of *Batson* to include the context and history of the defendant's prior

trials within the *Batson* analytical framework, so too should this Court extend *Batson* to include the context and history of the veniremembers being asked the question as to their opinion of law enforcement.

Although a *Batson* challenge and the following analysis are usually heavily fact-based inquiries, it is however important to consider the various contexts from which those facts can enter the analysis. *Batson* itself limited the facts to those of the case at bar. *Flowers* then expanded the scope to consider the racial motivations and intent of a prosecutor from the defendant's numerous previous trials. 139 S. Ct. 2245-47. Here, Byars suggests this Court expand the context again to encompass the racial realities of veniremembers and demand that a court consider the discriminatory effect a particular reason for a peremptory challenge might have. This Court's holding in *Flowers* underscores the particular importance on context, stating that an analysis be based on "all the necessary facts and circumstances taken together." 139 S. Ct. at 2251.

In sum, *Batson's* promise to eradicate discriminatory peremptory strikes has proven "illusory." Judge Mark W. Bennett, *supra* at 162. This Court recognized in *Miller-El* that *Batson* requires courts to assess the plausibility of proffered reasons "in light of *all* evidence with a bearing on it." 545 U.S. at 252 (emphasis added). But courts are wary to look beyond the four corners of the case for relevant circumstances – like disparate treatment of minorities in our criminal justice system – to make inferences of discrimination. In short, without explicit permission from this Court, lower courts will continue to avoid considering the discriminatory effect of removing jurors for reasons that are steeped in implicit or unconscious discrimination, and instead continue to condone the State's peremptory challenges – such as that occurred in this

case – because those challenges were not overtly purposely discriminatory. Therefore, this Court should grant *certiorari* to fulfill the promise of *Batson* by making clear to lower courts that they must consider implicit or non-purposeful discrimination during a *Batson* challenge, and must consider the discriminatory effect a reason for a peremptory strike might have on the racial make-up of a jury. Further, by granting *certiorari* this Court can recognize and remedy the constitutional violation that occurred here, and reverse Santonio Byars' conviction and sentence and remand this matter for a new trial.

CONCLUSION

For the foregoing reasons, Petitioner, Santonio Byars, respectfully prays that a writ of *certiorari* issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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