
No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID MINOR,

Petitioner,

v.

BEVERLY HASTINGS; ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Respondents.

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

**PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX**

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QUESTIONS PRESENTED FOR REVIEW

1. When evaluating a claim of racially discriminatory strikes in jury selection, whether a court may (a) impose upon a defendant the ultimate burden of persuasion at the point at which, under *Batson*, he is only required to set forth a *prima facie* case of discrimination; (b) grant deference to the trial court's determinations as to the credibility of the State's explanations for its racially discriminatory strikes where no credibility determinations were made, and (c) look to the ultimate composition of the jury to determine whether a *prima facie* case of racial discrimination was established.
2. Whether due process permits the prosecutor to quantify her burden of beyond a reasonable doubt as 80 percent certainty, and whether the trial court can thereafter evaluate whether a trial containing such a statement is fundamentally unfair without considering the overall strength or weakness of the State's evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Minor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 22, 2017, rehearing of which was denied on October 31, 2017, in *Minor v. Hastings*, No. 16-2082.

CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court is published at 704 F. App'x 103 (3d Cir. 2017) and reproduced at Pet. App. 2a-10a. The order denying the petition for panel rehearing and rehearing *en banc* was entered on October 31, 2017 and is reproduced at Pet. App. 11a-12a. The District Court's decision is unpublished and available at No. 09-0369, 2016 U.S. Dist. Unpub. LEXIS 40988, 2016 WL 1223285 (D.N.J. Mar. 29, 2016), and reproduced at Pet. App. 13a-46a.

The decision of the Superior Court of New Jersey, Appellate Division, affirming Minor's convictions is unpublished and available at No. A-6501-05T4, 2008 N.J. Super. Unpub. LEXIS 68, 2008 WL 4377436 (N.J. Super. Ct. App. Div. Sept. 29, 2008), and reproduced at Pet. App. 47a-62a. The New Jersey Supreme Court denied certification at 197 N.J. 16 (2008).

Relatedly, but not relevant to this Petition, Minor also filed a petition for post-conviction relief in New Jersey State Court, the denial of which was affirmed by the Superior Court of New Jersey, Appellate Division. *State v. Minor*, No. A-5659-09T1, 2012 N.J. Super. Unpub. LEXIS 2554, 2012 WL 5845637 (N.J. Super.

Ct. App. Div. Nov. 20, 2012). The New Jersey Supreme Court denied certification at 214 N.J. 175 (2013).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 2017. Pet. App. 1a. A timely petition for panel rehearing and rehearing *en banc* was denied on October 31, 2017. Pet. App. 11a-12a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution 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.

STATEMENT OF THE CASE

David Minor has consistently maintained that he was falsely identified as the perpetrator of a gun-point robbery that occurred in 2002. He is currently serving a nineteen-year sentence for that robbery, based upon a one-day trial and the questionable testimony from a single eyewitness. As a result of errors in both jury selection and during the State's closing arguments, that trial was fundamentally unfair and warrants this Court's intervention, as more fully set forth below.

I. Factual Background

Lidwyn Cummings was walking to his truck one night when someone pressed a handgun against his side and demanded money. Pet. App. 15a. Cummings

handed over his wallet his keys, and the unknown individual emptied the wallet of cash, threw the keys across the street, and fled. *Id.* Cummings reported the incident and described the perpetrator as an African American male, five-foot, eight inches tall, approximately 150 pounds, between twenty-three and twenty-five years old, and wearing a black hooded sweater, gray pants, and a cap. Pet. App. 15a, 277a-78a. Police did not return to the area with Cummings to canvas for a suspect, nor did they attempt to take fingerprints from his keys. Pet. App. 279a. Detectives later presented Cummings with a six-photo array of individuals, and he selected Minor's photograph. Pet. App. 15a. When the police arrested Minor, they found no evidence connecting him to the robbery. Pet. App. 288a-89a, 298a, 299a, 307a.

II. The State Court Trial

A. The State's Race-Motivated Peremptory Challenges

On the first day of jury selection, Minor objected when the State used its first five peremptory challenges to strike five women, four of whom were African American. The Court asked the State whether any of these prospective jurors had "differences between them" and the State responded that "there was some that had something in common as far as the – for the reason for the State's exclusion. But they all had differences between them." No further explanation was provided, but based on this statement, and despite recognizing that race is a cognizable class and that 80 percent of the prior challenges had excluded black jurors, the trial court concluded that the defense had not shown a "substantial likelihood" that the State's challenges were racially motivated and therefore had not made out a *prima facie*

case of race discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 117a-25a.

The following day, the prosecutor three times asked the trial court to require defense counsel to provide race-neutral reasons for peremptorily striking Caucasian jurors. The first request followed the defense's striking seven Caucasian individuals and two African-American women. Pet. App. 174a-77a. The prosecutor later renewed her objection after defense counsel had used thirteen of her sixteen peremptory challenges against Caucasians. Pet. App. 243a-51a. The trial court required defense counsel to justify her peremptory challenges, and she detailed her legitimate rationale for each one. Pet. App. 244a-47a.

In response, the prosecutor complained that the State “now has run out of its challenges” and asked the court to excuse the jury and begin anew “because I am now – the majority of the individuals on the jury are African American.” Pet. App. 249a-50a. Seemingly realizing the alarming impropriety of her words and the light it shed on her intent in striking the jurors she had, the prosecutor added, “I have no objection to [a majority African American jury], I would like a mixed . . . jury panel, but the State has now run out of challenges . . . the State is now in a position where I can no longer challenge anyone, that's not the reason that I want to do this, . . . [but the] panel now is made up of juror[s] that the State does not feel were picked on a fair and impartial basis.” Pet. App. 251a.

The trial court denied the State's motion, finding that the defense had presented “genuine and reasonable grounds for believing the potential jurors might

have situation[] specific biases.” *Id.* The defense then challenged an Hispanic juror, and the State raised a third reverse-*Batson* challenge, saying, “I would consider [him] in the white race class” and again complaining that the State had no remaining challenges. Pet. App. 256a-57a. During argument, the prosecutor stated “I also want to note that juror number eight keeps looking over at [defense counsel] and smiling, who’s an African-American male.” Pet. App. 273a. The trial court again denied the State’s motion. *Id.*

B. The Prosecutor’s Summation Misconduct

The State’s case against Minor was decidedly weak – based entirely on the victim’s identifications. Cummings claimed in court that he was 80 percent certain that Minor was his assailant, and that he had been 95-100 percent sure when he initially selected Minor’s photograph. Pet. App. 15a-17a. On cross-examination, however, Cummings provided ample reason to doubt the percentages he had assigned to his identifications: “I’ve never been in that situation before; find myself looking down at a gun. **When somebody with a gun, I don’t care who it is, I’m not going to look at their features, try to remember if they look—what they look like or who they look like. No. I’m terrified.**” Pet. App. 300a (emphasis added). Indeed, when asked whether Minor, as he appeared in court, looked the same as he did in his photo-array picture, Cummings again was uncertain, testifying: “A little. . . . I think he had more hair at the time.” Pet. App. 291a-92a. Cummings’ initial description immediately following the incident did not make any reference to facial hair; and in fact, he described an individual who had his hair covered by a hat. Pet. App. 289a. The State, however, relied entirely upon this

identification, offering no evidence to corroborate the victim's account, *i.e.*, testimony of other eyewitnesses, recovery of property stolen during the robbery, fingerprints from the victim's keys, the gun, cell-site location data placing Minor in the vicinity of the robbery, *etc.* Pet. App. 307a-08a, 317a, 315a, 326a.

At the close of the State's case, defense counsel moved to dismiss all counts, arguing that the victim's 80 percent certainty could not satisfy the State's burden of proving the defendant guilty beyond a reasonable doubt. Pet. App. 309a. The prosecutor responded that, "in a civil case, by a preponderance of the evidence is just a little bit more than 50/50. Here, this victim said 80 percent, which I would submit, meets the standard of beyond a reasonable doubt." Pet. App. 311a. The trial court interrupted the prosecutor's argument to correct this misstatement of the law, saying "[a]ctually, I don't believe I've read any cases or statutes yet which define reasonable doubt in terms of percentage of certainty." *Id.*

Despite this exchange, the prosecutor argued in her summation that same day that, although memories fade with the passage of time,

80 percent is a very high percentage, ladies and gentlemen. **That's beyond a reasonable doubt.** Preponderance of [the] evidence in civil cases is a little more than 50/50. **Beyond a reasonable doubt is 80 percent, 90 percent, 100 percent. That's all we need. That's sufficient.**

Pet. App. 324a-25a (emphasis added).¹ The trial court did not give a curative instruction or any specific instruction during the jury charge to address the use of

¹Defense counsel said in her summation: "I would submit that 80 percent, a low B, is not proof beyond a reasonable doubt, not when the victim acknowledges being nervous" Pet. App. 316a-17a.

percentages in defining what constitutes proof beyond a reasonable doubt. Pet. App. 329a-30a.

After a one-day trial, Minor was convicted on all three counts charged in the indictment. Pet. App. 13a-14a. He was ultimately sentenced to nineteen years' imprisonment with an 85 percent period of parole ineligibility. Pet. App. 14a.

III. The State Court Direct Appeal

Minor appealed his conviction to the Superior Court of New Jersey, Appellate Division. He argued that the trial court had violated his constitutional rights when it concluded that he had not made a *prima facie* showing of race discrimination in jury selection. Pet. App. 63a-69a. He also contended that the prosecutor had deprived him of his right to a fair trial by misstating the burden of proof in summation and effectively directing a guilty verdict. Pet. App. 70a-72a.

The Appellate Division rejected both claims in an unpublished opinion issued on September 29, 2008. Pet. App. 47a-62a. The state appellate court first recognized that the trial court had imposed an erroneously high burden on Minor at step one of the three-step inquiry demanded by *Batson*,² but purporting to apply the correct legal standard, it held that Minor “did not make a *prima facie* showing that

²The process required by *Batson* and its progeny requires that a defendant first “make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race” (step 1), *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 522 U.S. 472, 476-77 (2008); thereafter, “the prosecution must offer a race-neutral basis for striking the juror in question,” (step 2) *id.*; and finally, “in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination,” *id.*, a determination that involves evaluating “the persuasiveness of the [prosecutor’s] justification” for the strike and the submissions of defendant to rebut the State’s explanation and to carry his “ultimate burden of persuasion regarding racial motivation.” *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

the jury was not drawn from a representative cross-section of the community.” Pet. App. 58a-59a.

Second, the Appellate Division readily agreed with Minor that “[t]he comments by the prosecutor,” quantifying the burden of persuasion, “were obviously an incorrect statement of the law.” Pet. App. 60a. But the court nonetheless declined to order a new trial, or provide for any other remedy, because the trial court provided the jury with the pattern instruction on the meaning of reasonable doubt and had charged the jurors to obey the court’s instructions and to ignore conflicting attorney statements about the law. *Id.* Without considering the weakness of the State’s case, the Appellate Division held that these standard instructions were sufficient to guarantee a fair trial. *Id.*

The New Jersey Supreme Court denied Minor’s petition for discretionary review, *State v. Minor*, 197 N.J. 16 (2008), and Minor thereafter unsuccessfully litigated a petition for post-conviction relief in New Jersey State Court. *Minor*, 2012 N.J. Super. Unpub. LEXIS 2554, 2012 WL 5845637.

IV. The Habeas Proceedings

On January 25, 2013, Minor timely filed a *pro se* application for habeas relief under 28 U.S.C. § 2254. Pet. App. 17a. He asserted that the state courts had violated his Fourteenth Amendment right to equal protection by failing to require the prosecutor to provide race-neutral reasons for striking African-American jurors. *Id.* Minor also asserted that the prosecutor had deprived him of his Fourteenth Amendment right to due process and a fair trial by misstating the law in

summation when she advised the jury that the victim's 80 percent certainty that Minor was the person who robbed him satisfied the "beyond a reasonable doubt" standard for adjudicating guilt. Pet. App. 18a.

A. The District Court Decision

On March 29, 2016, the District Court denied Minor's § 2254 application. Pet. App. 13a-46a. With respect to Minor's *Batson* claim, the District Court reasoned that the State Appellate Division's determination was not an unreasonable application of the law because it was "required to presume the correctness of the Appellate Division's finding that the majority of jurors in Minor's trial were African-American." Pet. App. 32a. The District Court further reasoned "that it is proper to consider the ultimate composition of the jury in determining whether the defendant has established a *prima facie* case under *Batson*." Pet. App. 33a (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Although the trial court had not made any findings of fact as to the State's intent in exercising its peremptory challenges, and indeed indicated that it was not reaching step three under *Batson* by finding no *prima facie* case, the District Court nevertheless concluded that it was required to accord significant deference to the state court's "finding" that Minor had not established a *prima facie* case. Pet. App. 32a, 117a-25a.

The District Court also rejected Minor's claim that the prosecutor's summation misconduct had irretrievably tainted the fairness of his trial, concluding that the Appellate Division reasonably applied *Darden v. Wainwright*, 477 U.S. 168 (1986), when it concluded that the prosecutor's concededly improper remarks did

not render the trial fundamentally unfair. Pet. App. 35a-38a. In addition to citing the curative effect of the trial court’s standard jury instructions, the District Court, in an effort to portray the State’s case against Minor as strong, cited the “near certainty” of the victim’s photo identification, Pet. App. 36a, though there was no State Court finding to that effect, as there certainly could not have been given the testimony in this case and, more generally, the by now well-recognized pitfalls of eyewitness-identification testimony.³ The District Court also refused to issue a certificate of appealability (“COA”). Pet. App. 47a.

B. The Third Circuit Decision

On April 18, 2016, Minor timely filed his notice of appeal and ultimately filed a *pro se* motion for a COA, which the United States Court of Appeals for the Third Circuit granted as to his prosecutorial misconduct claim and later expanded to include his *Batson* claim. Nonetheless, on August 22, 2017, a panel of the Court of Appeals affirmed the District Court’s decision in a non-precedential opinion, though

³“Eyewitness misidentification is one of the leading causes of wrongful convictions nationwide, playing a role in about 70% of convictions overturned through DNA testing. More than 30 years of social science research has proven that eyewitness identification is often inaccurate and unreliable.” SYMPOSIUM ON THE CENTER ON WRONGFUL CONVICTIONS: WHO COULD IT BE NOW? CHALLENGING THE RELIABILITY OF FIRST TIME IN-COURT IDENTIFICATIONS AFTER STATE V. HENDERSON AND STATE V. LAWSON, 105 J. Crim. L. & Criminology 947, 949 (2015); Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 50 (2011) (“Eyewitness testimony is among the least reliable forms of evidence and yet persuasive to juries.”) (quoting Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 L. & Hum. Behav., 603, 605 (1998)). As this Court has recognized, the presence of a weapon and “whether the witness was under stress” are “factors that bear on the likelihood of misidentification.” *Perry v. New Hampshire*, 565 U.S. 228, 243-44 (2012); *see also State v. Henderson*, 27 A.3d 872, 904-05 (N.J. 2011) (“when a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. ‘Weapon focus’ can thus impair a witness’ ability to

it agreed that “this record is worrisome insofar as Minor’s *Batson* claim is concerned.” Pet. App. 9a. Apparently treating the trial court’s ruling as a *Batson* step-three credibility determination, the Panel deferred to the state trial court and stated that “the trial court required the prosecutor to justify her challenges, and she did so,” and that “the record supports those nonracial reasons.” Pet. App. 9a-10a. With respect to Minor’s prosecutorial misconduct claim, the Panel stated that “the prosecution’s summation was troublesome,” but concluded that it did not constitute a violation of due process because it did not misstate the evidence, was in response to defense counsel’s argument, and was cured by the pattern jury instructions. Pet. App. 7a.

On September 5, 2017, Minor timely filed a motion for rehearing or rehearing *en banc*. The Court of Appeals denied that Motion in an Order dated October 31, 2017. Pet. App. 11a-12a. The court’s certified judgment in lieu of a formal mandate issued on November 9, 2017. Minor now seeks a writ of certiorari from this Court to the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because the lower courts have so departed from the accepted and usual course of judicial proceedings that they undermine the integrity of the judicial system. *See* Supreme Court Rule 10(a). In an effort to sustain a conviction reached through a fundamentally unfair process, the federal courts have abandoned both the law and the record, creating conflict

make a reliable identification and describe what the culprit looks like if the crime is of short duration.”).

with this Court's precedent and decisions of other circuits. This Court's authority to grant the Great Writ is not only David Minor's last chance at justice, but is also an opportunity to make clear that this Court will not countenance unfaithfulness to the record as a means of granting undue deference to state trial courts that disregard the protections of the United States Constitution.

A. The State Trial Court's Application of *Batson* was Contrary to Clearly-Established Federal Law Whether Viewed at *Batson* Step One or Step Three.

This Petition should be granted because no court that has reviewed Minor's case has properly applied the procedure set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, thus depriving Minor of his right to the Equal Protection of the Law and undermining the very integrity of the judicial system. Moreover, the Third Circuit's opinion has created a diluted *Batson* framework by conflating steps one and three – improperly looking to whether the defendant had shown purposeful discrimination in deciding whether he had made out a *prima facie* case, but without ever looking to the State's feeble explanation. This was contrary to this Court's established law and to the decisions of other circuits. See Supreme Court Rule 10(b)-(c) (certification warranted when United States Court of Appeals has entered a decision in conflict with another circuit court or decided “an important federal question in a way that conflicts with relevant decisions of this Court”).

Batson dictates a framework that does more than protect individual defendants from racial discrimination in jury selection and the attendant compromise to one's right of trial by an impartial jury. This Court has recognized

that “racial minorities are harmed more generally [by] prosecutors drawing racial lines in picking juries[, which] establish ‘state-sponsored group stereotypes rooted in, and reflexive of, historical prejudice.’” *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (quoting *J. E. B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)). The process set forth in *Batson* and its progeny is therefore meant to guard against government selection of jurors “tainted with racial bias,” and against a process as a result of which “the very integrity of the courts is jeopardized . . . invit[ing] cynicism respecting the jury’s neutrality,” and “undermine[ing] public confidence in adjudication.” *Id.* at 238.

That process consists of three steps for determining whether a party has used a peremptory strike with an improper discriminatory motive and thus violated a defendant’s right to equal protection: first, the party challenging the strike must demonstrate a *prima facie* case of discrimination.⁴ *Batson*, 476 U.S. at 93-94; *Foster*, 578 U.S. at ___, 136 S. Ct. at 1747. Thereafter, the burden shifts to the party that exercised the peremptory strikes to provide race-neutral explanations. *Batson*, 476 U.S. at 94; *see also Johnson v. California*, 545 U.S. 162, 168 (2005). Finally, “in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination,” *Foster*, 578 U.S. at ___, 136 S. Ct. at 1747, a determination that involves evaluating “the persuasiveness of the

⁴This Court made clear in *Batson* that this burden is low and can be met with numerical evidence alone. *See id.* at 93 (“disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law [] as to show intentional discrimination”) (internal quotation marks and citations omitted); *see also Johnson v. California*, 545 U.S. 162, 169-70 (2005) (the step one burden was not intended to be “onerous,” and the moving party is not required to “prove[] discrimination at step one”).

[prosecutor's] justification" for the trike and the submissions of the defendant to rebut the State's explanation and to carry his "ultimate burden of persuasion regarding racial motivation." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*); *Williams v. Beard*, 637 F.3d 195, 216 (3d Cir. 2011) ("After the parties have satisfied their respective burdens of production in [the] first two steps, the defendant must prove purposeful discrimination by a preponderance of the evidence"). It is at this third stage, when a trial court makes a factual finding, that an appellate court defers to the trial court's judgment. *Snyder*, 552 U.S. at 477.

1. The Lower Courts Have Created A Diluted *Batson* Analysis.

The trial court in this case expressly stated that the defense had not made out a *prima facie* case of racial discrimination – the first step of a *Batson* inquiry. Pet. App. 124a. However, as each court has recognized in reviewing Minor's case, the trial court applied an erroneously high step-one burden by requiring a "substantial likelihood" of race-based motivations, Pet. App. 55a, rather than "an inference that discrimination has occurred." *Johnson*, 565 U.S. at 170. The New Jersey Appellate Division purported to address this error but, as the Third Circuit recognized, failed to do so, improperly increasing Minor's burden at *Batson* step one by looking to the ultimate composition of the jury. *See* Pet. App. 10a ("The Appellate Division incorrectly focused on the ultimate composition of the jury at Step One. At that stage, all that matters is whether the juror was being removed because of race. Being required to defeat the ultimate composition of the jury at Step One would impose too high of a burden at that stage."). Indeed, that burden

was insuperable, since when Minor raised his *Batson* objection, the jury was not yet seated, so he would have had no way of addressing the ultimate composition of the jury in establishing a *prima facie* case of discrimination. *See infra*, Part A.3.

The District Court repeated this same error. *See* Pet. App. 33a (stating that, “like the Appellate Division, the Supreme Court has concluded that it is proper to consider the ultimate composition of the jury in determining whether the defendant has established a *prima facie* case under *Batson*”) (citing *Cockrell*, 537 U.S. 322). The District Court’s reliance on this Court’s decision in *Cockrell*, 537 U.S. 322, misunderstood that *Cockrell* reviewed a state court’s *third*-step finding that there had been no discrimination, with the benefit of the prosecutor’s proffered reasons for striking minority jurors and arguments in response from the defense. Here, by contrast, the District Court was reviewing a *step-one* finding without the prosecutor having provided any reasons at step two. Moreover, the Court in *Cockrell* noted that the statistical evidence presented – that the prosecution excluded 91 percent of eligible African-American venire members and used ten of fourteen strikes against African-Americans – was likely sufficient to show discrimination at step three. It did not suggest (much less hold) that a defendant had to show the same sort of exclusion rate to draw an inference of discrimination at *Batson*’s step one, or that a sufficient number of African-Americans on the petit jury could cure any prior discrimination.

Notwithstanding the state court’s actions in thus imposing upon Minor the ultimate burden or persuasion at *Batson* step-one, the Third Circuit refused to

grant relief, concluding that “the trial court required the prosecutor to justify her challenges, and she did so,” and that “the record supports those nonracial reasons.” Pet. App. 9a-10a. That is, rather than saving the trial court’s determination, the Court of Appeals conflated the first and third *Batson* steps, creating a confused standard that increases a defendant’s burden, contrary to both this Court’s precedent, *see supra*, Part A.; *Foster*, 578 U.S. at ___, 136 S. Ct. at 1747; *Johnson*, 545 U.S. at 168; *Batson*, 476 U.S. at 93-94, and the decisions of other circuits, which recognize that the “analytical structure established by *Batson* cannot operate properly” if the court permits its steps to be conflated. *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011). *See also Sanchez v. Roden*, 753 F.3d 279, 305 (1st Cir. 2014) (rejecting State’s position, which “improperly conflates the three separate steps of the *Batson* inquiry”); *United States v. Kimbrel*, 532 F.3d 461, 4667 (6th Cir. 2008) (reversing where court “conflated steps two and three of the *Batson* analysis – assessing the persuasiveness of Kimbrel’s proffered explanation without first acknowledging that he had come forward with a race-neutral justification”); *Yee v. Duncan*, 441 F.3d 851, 863-64 (9th Cir. 2006) (rejecting approach that “erroneously conflated steps two and three of *Batson*’s analysis”).

Specifically, treating the trial court’s *Batson* step-one conclusion as a *Batson* step-three finding of no purposeful discrimination cuts out the second *Batson* step and thereby undermines the defendant’s right to attempt to rebut any race-neutral explanations offered by the prosecutor for excluding the jurors. *See Atkins*, 843 F.3d at 631-32 (discussing use of comparative juror analysis to rebut prosecution’s

proffered race-neutral justifications for strikes). But here, even as the trial judge moved beyond *Batson* step one by asking the State whether there were any differences amongst the jurors it had stricken, it did not permit Minor to meaningfully participate in *Batson* step three by responding to the prosecutor's purported reasons (such as they were) for striking so many African-American jurors. And this, in turn, impaired the court's ability – and the ability of every reviewing court, including this one – to assess the proffered reasons for the State's strikes. *Cf. Davis v. Ayala*, __ U.S. __, 135 S. Ct. 2187, 2206 (2015) (finding no prejudice in inability of defendant to challenge the State's race-neutral explanation where the trial court had the benefit of defense argument on the issue because defense counsel had specifically addressed it earlier during voir dire).

The import of the Panel's decision is that it requires a defendant, like Minor, to formulate and then rebut potential race-neutral reasons for the State's peremptory strikes, though the prosecutor has never articulated them. But that is simply not the process dictated by *Batson* and its progeny. And the analysis dangerously endorsed by the Third Circuit is not only entirely disloyal to the facts of this case, since the State, in fact, proffered no cognizable reasons for its obviously race-based strikes, but also stands for the proposition that a defendant must, in order to bear his burden of ultimately showing that the strikes were not race-based, somehow conjure up such reasons and then rebut them, in an exercise that would be as bizarre as it is unfair.

The record here demonstrates the problem: though the Third Circuit based its decision on the holding that “the trial court required the prosecutor to justify her challenges, and she did so,” and that “the record supports those nonracial reasons,” Pet. App. 9a-10a, in fact, the record reveals no such thing. To the contrary, the prosecutor offered no race-neutral reasons whatsoever; indeed, for at least one excluded African-American juror, no reasons could possibly be discerned from her responses to voir dire questions, which amounted to her simply responding “no” to each question and providing no additional information about herself beyond her appearance.⁵

⁵After defense counsel objected to the prosecutor’s strikes and presented argument for a *prima facie* case of racial discrimination, the prosecutor stated that it was “clear from the answers that the jurors gave that are African American that I have excluded, form the basis of my decision and not because they are simply African American.” Pet. App. 120a. But no specific answers were identified and, in fact, the record does not support the prosecutor’s statement. Indeed, for at least one challenged juror, the responses to the juror questionnaire provided no reasons, but were simply “no.” The entire voir dire for Ms. Braswell consisted of the following:

Clerk: Braswell, with a B (phonetic).
Court: Yes, ma’am.
Juror: Theresa Braswell – one, no. Two, no. Three, no.
Four, no. Five, no. All of them really – six, no.
Seven, no. Excuse me, eight, no. Nine, no.
Court: Well, thank you. Please have a seat in seat number
two. Next name, please. Defense?

Pet. App. 103a. With no detail in Ms. Braswell’s responses to the voir dire questionnaire, there is nothing in the record apart from her race, based upon which the State’s exclusions can be understood. The juror questionnaire contained the following questions:

What is your name and occupation?

What is the occupation of other members of your household, including your spouse and/or adult children?

Have you previously served on a jury of any kind?

Have you or a relative or a close friend ever been convicted of a crime?

Have you, a relative or a close friend ever been accused of a crime?

Have you, a relative or a close friend ever been a witness to a crime?

Have you, a relative or a close friend ever been a victim of a crime?

Thus, to the extent race-neutral reasons can be found in this record, they have been manufactured by the court. This is directly contrary to this Court’s recent decision in *Williams v. Louisiana*, __ U.S. __, 136 S. Ct. 2156 (2016), which vacated the state court judgment and remanded for further consideration of a “Louisiana procedural rule that permits the trial court, rather than the prosecutor, to supply a race-neutral reason at *Batson*’s second step if the court is satisfied that such reason is apparent from the voir dire examination of the juror.” In doing so, four Justices reiterated the *Batson* three-step process, making clear that “[a]t *Batson*’s second step, ‘the trial court [must] demand an explanation from the prosecutor.’” *Id.* (quoting *Johnson*, 545 U.S. at 170); *see also Johnson*, 545 U.S. at 172-73 (“The *Batson* framework is designed to produce actual answers [from a prosecutor] to suspicions and inferences that discrimination may have infected the jury selection process.” It is improper to “rel[y] on judicial speculation to resolve plausible claims of discrimination.”).

The Third Circuit’s new *Batson* framework blurs the boundaries between the three steps and undermines the protections this Court has developed. A decision so contrary to law and divorced from the record cannot, in our system of justice, form the basis of Minor’s continued incarceration or future precedent in the Third Circuit or elsewhere. The Court should grant a writ of certiorari.

Do you have any relatives or close friends employed in or connected with the field of law enforcement?

Is there any reason why you would not be able to be a completely fair and impartial juror in this case?

Pet. App. 74a-76a.

2. The Third Circuit's Analysis Grants Deference Where None Is Due.

Relatedly, the Third Circuit's reformulation of *Batson* improperly defers to a trial court conclusion that involves no credibility determination. The Court of Appeals acknowledged that the "Supreme Court's requirement for deference to a trial court's *Batson* finding is limited to the discriminatory intent prong of *Batson*, and not in the initial *prima facie* showing," but then stated that it "may well have reached a different result if we were reviewing this record *de novo*." Pet. App. 9a-10a. But *de novo* is precisely the level of review that was appropriate where, as here, the trial court did not follow the three distinct *Batson* steps.

As previously discussed, it is only at step three that the trial court has the opportunity to hear from both sides and make credibility determinations, which are entitled to deference. See *Cockrell*, 537 U.S. at 339 (deference only necessary at final step of the process "because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations"); *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (directing that deference be afforded to a trial court determination following *Batson* step three where defendant was able to rebut the prosecutor's claimed race-neutral reasons for peremptory strikes). But that did not occur here, where the prosecutor offered no explanation whatsoever upon which the trial court could base a credibility determination. And indeed, the trial court did not weigh the evidence or make any comment on the prosecutor's credibility, but instead confined its "finding" to *Batson* step one. Accordingly, no deference was due by any reviewing court. See

Rutledge, 648 F.3d at 558 (“if there is nothing in the record reflecting the trial court’s decision, then there is nothing to which we can defer”) (citing *Snyder*, 552 U.S. at 479). And indeed, the Third Circuit’s approach, which views *Batson*’s burden-shifting framework loosely, opens the door to unwarranted deference and degradation of meaningful appellate review of legal issues that actually involved no credibility evaluations whatsoever. *See Johnson*, 545 U.S. at 173 (reviewing and deciding whether defendant had met his burden at *Batson* step one without deferring or remanding to California courts since “[t]hose inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*.”).

3. The Third Circuit’s Opinion Opens The Question Of Whether and When The Ultimate Composition Of A Jury Is Appropriately Considered Under Its Modified Batson Analysis.

Finally, the Third Circuit based its decision at least in part on “the ultimate composition of the jury.” However, courts have made clear that adding members of the cognizable group *after* the defense has objected may simply show that the prosecutor sought to shield prior discriminatory strikes from further challenge. *See Rice v. White*, 660 F.3d 242, 256 (6th Cir. 2011) (noting that the “trial court erroneously believed . . . that *Batson* violations may be ‘cured’ by reference to the ultimate racial composition of the [petit jury]”); *see also Shirley v. Yates*, 807 F.3d 1090, 1102 (9th Cir. 2015) (trial judge’s *Batson* ruling put the prosecution “on notice: if he struck the remaining black veniremember, he would be required to give reasons for all three strikes”); *Batson*, 476 U.S. at 95 (“A single invidiously

discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.”). Thus, whether the ultimate jury was composed of a majority of African-Americans (a factor relied upon by the State appellate court, which the District Court found reasonable, Pet. App. 33a-34a), is not relevant to the *Batson* inquiry.

To the extent the Third Circuit was referring to the kind of statistical analysis present in *Cockrell*, 537 U.S. at 342 (considering exclusion rate of 91 percent of eligible African-American venire members and ten of fourteen strikes used against African-Americans), it erred in allowing this kind of evidence to be considered at step one, rather than where it belonged at step 3, when a prosecutor’s actual motivations in striking jurors may be considered. But the kind of evidence here allowed, which, by its nature, cannot be contemplated until after the selection of the jury as a whole, improperly imposes upon a defendant, as was done to Minor, the obligation to present statistical data about the ultimate composition of the jury, though the defense must object as the jury is being chosen and thus before this information could possibly be known. That is, it creates an impossible burden of proof, especially for establishing a *prima facie* case.

Compounding the errors of prior reviewing courts, the Third Circuit’s diluted *Batson* standard not only deprives defendant Minor from realizing the rights guaranteed by *Batson*, but it also sets an unworkable and conflicting precedent for future cases. The Third Circuit’s approach, which improperly imposes the ultimate burden of persuasion on a defendant at the point at which he is only required to

make a *prima facie* showing, then defers to legal determinations that, in fact, involve no credibility findings, and looks to the ultimate composition of the jury as a shortcut for a complete three-step *Batson* analysis, is contrary to this Court's established law and to decisions of other circuits. The Court should grant a writ of certiorari to prevent *Batson* from thus becoming an empty letter and failing to realize its great and important constitutional promise.

B. The Due Process Clause Guarantees The Right To A Fair Trial, Which Cannot Be Met When The Prosecutor Quantifies Her Burden Of Proof As 80 Percent And Where Reviewing Courts Fail To Consider The Strength Of The State's Evidence.

The Court should also grant a writ of certiorari to clarify that the burden of proof in a criminal trial – beyond a reasonable doubt – cannot be quantified, and certainly cannot be conveniently set to match whatever self-ascribed certainty the State's witness can muster. This Court has not addressed the remedy when such error does occur, and should resolve the split created by the Third Circuit's opinion, which sanctioned an improper numerical representation of the prosecution's burden without considering the weight of the evidence against the defendant.

1. Beyond A Reasonable Doubt Cannot be Quantified.

The State's burden to prove guilt beyond a reasonable doubt is a "notion – basic in our law and rightly one of the boasts of a free society – [that] is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *In re Winship*, 397 U.S. 358, 362 (1970). "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself," applying a high standard of proof, "designed to exclude as nearly

as possible the likelihood of an erroneous judgment.” *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). The concept of reasonable doubt is so fundamental to an accurate determination of guilt that an instruction by a trial court that fails to convey the proper burden is structural error, not requiring a demonstration of prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Thus, as the Third Circuit Court of Appeals did here, albeit without granting relief, a number of circuit courts have recognized that it is improper for a prosecutor to reduce reasonable doubt to a quantitative measure. Pet. App. 7a (“prosecution’s summation was troublesome”); see, e.g., *United States ex rel. Bartlett v. Briley*, 453 F.3d 796 (7th Cir. 2006) (recognizing impropriety of prosecutor analogizing burden to a jigsaw puzzle that was 30 percent completed); *Petrocelli v. Angelone*, 248 F.3d 877, 888 (9th Cir. 2000) (disapproving the prosecutor’s comment to prospective jurors that proof beyond a reasonable doubt is “like getting to the 97 yard line”); *United States v. Pungitore*, 910 F.2d 1084, 1128 (3d Cir. 1990) (disapproving of prosecutor’s “attempt to quantify reasonable doubt” through comment that “government’s case was analogous to a 500 piece jigsaw puzzle with 8 pieces missing”); *United States v. Anglada*, 524 F.2d 296, 300 (2d Cir. 1975) (sticks missing from bundle of twigs was improper quantitative example); see also *Law Probability and Risk* (2006) 5 (2): 135 (discussing additional state cases disapproving quantification of beyond a reasonable doubt standard and noting that “to attempt to quantify proof beyond a reasonable doubt changes the nature of the legal concept of beyond a reasonable

doubt, which seeks abiding conviction or moral certainty rather than statistical probability”) (internal quotation marks and citations omitted).

Indeed, two State courts took exception to the prosecutor setting the burden of proof at 80 percent. The New Jersey Appellate Division agreed that “[t]he comments by the prosecutor were obviously an incorrect statement of the law.” Pet. App. 60a. And even the trial court tried to ward off this error prior to closing arguments. During argument on Mr. Minor’s mid-trial motion for a judgment of acquittal, the prosecutor referred to percentages in defining what constituted guilt beyond a reasonable doubt. Pet. App. 311a. The trial judge interrupted argument to correct the misstatement, saying, “Actually, I don’t believe I’ve read any cases or statutes yet which define reasonable doubt in terms of percentage of certainty.” *Id.*

Given the trial judge’s prior warning that these assertions would misstate the law and the importance of the concept of reasonable doubt to an accurate determination of guilt, the prosecutor’s comments are improper even if they had been invited by the defense.⁶ By defining the concept of beyond a reasonable doubt

⁶Of course, they were not: these comments cannot be considered a fair response to defense counsel’s analogy to grades and her suggestion that a low B, in the context of the evidence presented, would not rise to the level of beyond a reasonable doubt, Pet. App. 316a-17a. Defense counsel simply stressed the weakness of the testimony; she did not improperly quantify the burden of proof by, for example, arguing that proof beyond a reasonable doubt requires 100 percent certainty. Certainly, they did not approach the impact of the prosecutor’s comments in telling the jury that (1) the victim’s self-described 80 percent certainty of his identification was, in fact, accurate, and (2) it automatically sufficed to meet the State’s burden of proof. See *Darden*, 477 U.S. at 182 (“[T]he idea of ‘invited response’ is used not to excuse improper comments, but to determine their effect on the trial as a whole.”). Here, the State was not seeking to “neutralize improper defense arguments” but rather to “rely on them as a springboard” to launch an improper attack by equating the burden of proof with the victim’s claim, doubtful on its face, that he was 80 percent sure that Mr. Minor had robbed him. *Pungitore*, 910 F.2d at 1126.

as 80 percent, the State effectively communicated to the jury that it could disregard the critical fact that there was no evidence corroborating the victim's identification. That would be inappropriate in any circumstances, but it is intolerable in a weak case turning solely on eyewitness-identification testimony which was questionable, at best, on its face.

2. The Fairness Of A Trial Cannot Be Evaluated Without Considering The Strength Of The State's Evidence.

The Third Circuit's decision also marks a departure from *Darden's* requirement that, in order to evaluate whether prosecutorial misconduct during summation "so infected the trial with unfairness as to make the resulting conviction a denial of due process," the court must consider the evidence against the defendant. *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1973)); see Supreme Court Rule 10(b)-(c) (certification warranted when United States Court of Appeals has entered a decision in conflict with another circuit court or decided "an important federal question in a way that conflicts with relevant decisions of this Court"). Under *Darden*, the strength of the State's evidence is crucial in evaluating the impact of the prosecutor's statements. 477 U.S. at 182 ("the overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges reduced the likelihood that the jury's decision was influenced by argument") (citation omitted); *Moore v. Morton*, 255 F.3d 95, 110-11, 119-20 (3d Cir. 2001) (reversing the denial of habeas relief based on prosecutorial misconduct where guilt turned on uncertain identification evidence); *Pagano v. Allard*, 218 F. Supp. 2d 26, 33-34 (D. Mass. 2002) (granting habeas relief where the

evidence was less than overwhelming and the State's summation improperly stated that the cloak of innocence "comes off" as the trial came to an end, rendering the trial "fundamentally unfair"); *accord Trillo v. Biter*, 769 F.3d 995, 1001 (9th Cir. 2014) (evaluate prosecutorial misconduct by placing improper comments in context of entire trial, which requires a court to "look to the weight of the evidence submitted against" defendant, among other factors); *Reed v. United States*, 133 F. App'x 204, 210-11 (6 Cir. 2005) (evaluation of prosecutorial misconduct claim includes whether evidence against the defendant was substantial).

Here, however, the Court of Appeals did not look to the State's evidence at all. Pet. App. 7a. Nor, in failing to do so, could the Court of Appeals have relied upon any evidentiary evaluation by the State Courts, since neither the trial court nor the New Jersey Appellate Division ever once mentioned the weakness (or strength, if applicable) of the State's case. Rather, the courts below concluded that, because the trial court's final instructions had charged the jury to "follow the instructions of the court and to ignore any statements by the attorneys on the law," the prosecutor's statements did not deprive Minor of a fair trial. Pet. App. 59a, 7a.

The danger in evaluating whether prosecutorial misconduct so infects a trial with unfairness so as to constitute a violation of due process in isolation – without examining the strength of the State's case – is no more apparent than in this case. The only evidence of guilt was the victim's testimony identifying Minor as the perpetrator. The trial – from opening statements to closing arguments – took place between approximately 1:30 p.m. on April 9, 2003, and 3:00 p.m. on April 10, 2003.

Pet. App. 274a, 346a. The jurors heard from one detective who took a statement from Cummings (the victim), Pet. App. 275a, and one detective who put together the photo array, Pet. App. 306a. The only other evidence was Cummings' testimony that, by the time of trial, he was 80 percent sure that Minor was the person who had robbed him, Pet. App. 15a-16a, even though he was admittedly terrified, focused on the gun, and not thinking about looking at the perpetrator's features, Pet. App. 300a. Indeed, Cummings' in-court identification raised further questions about that 80 percent figure. When asked whether Minor looked at trial the same as he did in the photograph selected from the photo array, Cummings said, "A little. . . . I think he had more hair at the time," a feature Mr. Cummings had omitted when describing the robber to the police and which he would not have been likely to observe in light of the hat he described the perpetrator as wearing. Pet. App. 301a-02a, 289a.

The failure to acknowledge the weakness of this testimony was particularly pronounced given the acknowledged unreliability and frequent inaccuracy of eyewitness identification testimony, as discussed above, "one of the leading causes of wrongful convictions nationwide." 105 J. Crim. L. & Criminology at 949. Indeed, eyewitness identification testimony was coming under increasing scrutiny even before the Appellate Division adjudicated Mr. Minor's direct appeal, *see State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) ("Eyewitness identification can be the most powerful evidence presented at trial, but it can be the most dangerous too. Misidentification is widely recognized as the single greatest cause of wrongful

convictions in this country.”), and certainly by the time the Third Circuit undertook its new, truncated analysis, with respect to the particular factors at issue here. *See Perry*, 565 U.S. at 243-44 (noting presence of a weapon and stress as “factors that bear on the likelihood of misidentification”); *Henderson*, 27 A.3d at 904-05 (presence of a weapon can “impair a witness’ ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.”). The social science cited in these decisions shows why the percentages of certainty the victim assigned to the reliability of his identifications were highly suspect. The victim confirmed that by acknowledging, “When somebody [has] a gun, I don’t care who it is, I’m not going to look at their features, try to remember if they look – what they look like or who they look like. No. I’m terrified.” Pet. App. 300a.

Beyond the weak identification testimony, there was no other evidence connecting Minor to the robbery. For this reason, the Appellate Division should have evaluated the harm flowing from the prosecutor’s misconduct much differently. Nor did the standard jury instructions provided eviscerate this harm. In fact, the jury charge in Minor’s case did not address this problem because the instruction on the burden of proof did not discuss percentages of certainty or include a specific curative instruction to rebut the prosecutor’s improper statement. Given this gap, the judge’s instruction that “any statements made by the attorneys as to what the law may be must be disregarded by you *if they are in conflict with my charge*,” Pet. App. 328a (emphasis added), simply did not make clear to the jury that it was to disregard the prosecutor’s statements. *Cf. United States v. Mooney*,

315 F.3d 54, 61 (1st Cir. 2002) (noting that evidence against defendant was “overwhelming” and finding prosecutor’s remarks harmless where trial judge issued “forceful curative instructions after the prosecutor made [an improper] remark [on defendant’s post-arrest silence]” and “explained the defendant’s constitutional right not to testify and government’s burden of proof beyond a reasonable doubt *sixteen times*”) (emphasis added).

In any event, the complete failure to place this alarming error in the context of the case as whole directly contravenes this Court’s requirement in *Darden*, as well as the decisions of other circuit courts of appeal, holding that prosecutorial misconduct must be evaluated in the context of the entire trial, including the quantum of evidence presented. 477 U.S. at 182 (denying habeas relief where two eyewitnesses identified defendant; defendant’s car was involved in a crash less than five miles from the crime in a vehicle seen at the crime scene immediately after the offense; defendant had partially disrobed himself during the offense and was observed buckling up his pants and belt at the crash shortly after the offense); *see also Clark v. Paramo*, Civil No. 12-1570, 2013 U.S. Dist. LEXIS 32804, at *1-2, 8 (C.D. Cal. Jan. 25, 2013) (despite a demonstrative aid suggesting that 75 percent certainty was sufficient to prove guilt beyond a reasonable doubt, denying habeas relief because of overwhelming evidence, which included two certain identifications of defendant as the perpetrator of a daytime robbery and a license plate and vehicle description that matched defendant’s registered vehicle), *adopted* 2013 U.S. Dist. LEXIS 29893 (C.D. Cal. Mar. 5, 2013), *aff’d*, 583 F. App’x 845 (9th Cir. 2014);

accord Trillo, 769 F.3d at 1001 (“look to the weight of the evidence submitted”); *Reed*, 133 F. App’x at 210-11 (evaluation of prosecutorial misconduct claim includes whether evidence against the defendant was substantial).

Under the Third Circuit’s analysis, the weakness of the State’s case was not even considered, let alone meaningfully weighed against the prosecutor’s misstatements. Such an application of the law places the decision of the Court of Appeals in conflict with those of this Court and of other Circuits and deprives the defendant of the due process guaranteed by the Fourteenth Amendment. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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