IN THE
SUPREME COURT OF THE UNITED STATES

NO. 14-9409

JABARI WILLIAMS
PETITIONER

VERSUS

STATE OF LOUISIANA
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether Louisiana law governing the exercise of peremptory challenges, which allows a trial judge to consider a prosecutor's race-neutral reason for striking a prospective juror when the race-neutral reason is obvious from the record of the *voir dire* examination, instead of requiring the prosecutor to state the reason for striking the juror on the record, runs afoul of this Court's ruling in *Batson v. Kentucky,* 106 S.Ct. 1712 (1986)?

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PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Jury trials for crimes, and procedural rights
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

U.S. Const. amend. VI.

Equal Protection

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Time for challenges; method; peremptory challenges based on race or gender; restrictions

C. No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

D. The court shall allow to stand each peremptory challenge exercised for a racially neutral reason either apparent from the examination or disclosed by counsel when required by the court. The provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror.

E. The court shall allow to stand each peremptory challenge for which a satisfactory racially neutral reason is given. Those jurors who have been peremptorily challenged and for whom no satisfactory racially neutral reason is apparent or given may be ordered returned to the panel, or the court may take such other corrective action as it deems appropriate under the circumstances. The court shall make specific findings regarding each such challenge.

La C.Cr.P. Art. 795.

Bill of exceptions unnecessary; objections required
An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

La C.Cr.P. Art. 841(A).

LACK OF JURISDICTION

The Petition for Writ of Certiorari raises the narrow legal issue as to whether Louisiana law governing the exercise of peremptory challenges, which allows a trial judge to supply a race-neutral reason for striking a prospective juror where the race-neutral reason is obvious from the record of the *voir dire* examination instead of requiring the prosecutor to state the reason for striking the juror on the record, *see* La.C.C.P. art. 795(C) and *State v. Elie*, 936 So.2d 791 (La. 2006), runs afoul of this Court's ruling in *Batson v. Kentucky,* 106 S.Ct. 1712 (1986).

As a matter of prudence if not jurisdiction, claims neither raised nor addressed in the state court may not be heard by this Court on petition for certiorari. *See Adams v. Robertson*, 117 S.Ct. 1028 (1997); *Yee v. City of Escondido,* 112 S.Ct. 1522 (1992). This rule serves an important interest of comity. *Bankers Life & Cas. Co. v. Crenshaw*, 108 S.Ct. 1645, 1651 (1988). As the Court has explained, "it would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb v. Webb*, 101 S. Ct. 1889, 1893 (1981)(citations and internal quotation marks omitted). Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Illinois v. Gates*,

103 S.Ct. 2317, 2323-24 (1983). Here, the Louisiana legislature has an undeniable interest in having the opportunity to determine in the first instance whether Louisiana's existing law governing the exercise of peremptory challenges to strike prospective jurors satisfy the requirements of equal protection, and whether to exercise its power to amend the law to avoid potential constitutional challenges.

This Court's traditional standard also reflects "practical considerations" relating to the Court's capacity to decide issues. *Bankers Life & Cas. Co.,* 108 S.Ct. at 1651. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists the Court in its deliberations by promoting the creation of an adequate factual and legal record. *See Webb,* 101 S.Ct. at 1893. Here, even if the state court's construction of Louisiana's law governing the exercise of peremptory challenges did not obviate the equal protection challenge, it would undoubtedly aid this Court's understanding of state law as a predicate to its assessment of the law's constitutional adequacy. And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court. *Adams v. Robertson*, 117 S. Ct. at 1031.

In the present case, while defendant alleged in his state appeal and in his subsequent application for writ of certiorari to the Louisiana Supreme Court that the prosecution failed to meet its burden under *Batson* of providing a race-neutral reason for excusing certain African American jurors, defendant failed to raise the precise issue raised in the present Petition for Writ of Certiorari, namely, whether Louisiana law which allows a trial judge to supply a race-neutral reason for striking a prospective juror when the reason is obvious from the *voir dire* examination, instead of requiring the prosecutor to do so, violates a defendant's equal

protection rights under *Batson*.[1] Nor did the Louisiana Fourth Circuit Court of Appeal or the Louisiana Supreme Court of Appeal address this constitutional issue. When the highest state court is silent on a federal question before this Court, the Court assumes that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented. *Adams v. Robertson*, 117 S. Ct. at 1029. "Fair presentation" of a claim in state court means that the petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004).

The State of Louisiana respectfully submits that defendant failed to present his claim raised in his Petition for Writ of Certiorari in the state courts.

STATEMENT OF THE CASE

On August 11, 2011, the State indicted the defendant, Jabari Williams, with second degree murder for the April 10, 2011 slaying of Selvin Gonzales. On January 26, 2012, the trial court denied the defendant's motions to suppress statements and identifications, and set a trial date of May 7, 2012. On May 7, 2012, the trial court granted the defendant's oral motion to continue and rescheduled the trial for June 18, 2012.

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[1] In fact, defendant did not raise the constitutional claim in the trial court. Defendant did not object to the *Batson* procedure employed by the trial court, nor did he move for a mistrial on this basis or raise the claim in his motion for post-verdict judgment of acquittal and for new trial. Under state law, an issue or objection not raised in the trial court cannot be considered on appeal or supervisory review. A contemporaneous objection is required to preserve an error for appellate or supervisory review. La.C.C.P. art. 841. *See also State v. Taylor*, 669 So.2d 364 (La. 1996). The purpose of the contemporaneous objection rule is to allow the trial judge the opportunity to rule on the objection and thereby prevent or cure an error. *State v. Ratcliff*, 416 So.2d 528 (La. 1982); *State v. Herrod*, 412 So.2d 564 (La. 1982). Since defendant failed to lodge a contemporaneous objection to the *Batson* procedure employed by the trial court, he failed to preserve the objection for appellate or supervisory review under state law.

Several weeks before trial, on May 22, 2012, the defense moved to have the defendant examined for competency to proceed to trial, and a hearing was scheduled for May 31, 2012. On May 31, 2012, the trial court heard testimony from court-appointed psychiatrists Dr. Rafael Salcedo and Dr. Richard Richoux, who examined the defendant and recommended that the defendant be found competent to stand trial. The defendant submitted the report by Dr. Jill Hayes, who had tested the defendant's I.Q. and recommended that he be found incompetent to stand trial. At the conclusion of the hearing, the trial court found the defendant competent to stand trial. Both the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court denied the defendant's writ applications seeking review of that ruling. *See* Fourth Cir. No. 2012-K-0855 (La. App. 4th Cir. June 11, 2012)(unpub'd) and LASC No. 2012-KK-1366, reported at 90 So.3d 445 (La. June 15, 2012).

On June 15, 2012, three days before trial, the defendant filed a motion to continue on the grounds that "a material witness" the defendant intended to call to testify at trial was unavailable. The trial court denied the motion. On the morning of trial, June 18, 2012, the defense again moved for a continuance, this time on the ground that Dr. Hayes would not be available to testify, and the trial court denied the motion. The defendant sought supervisory review to the Louisiana Fourth Circuit Court of Appeal regarding the court's denial of the continuance and its denial of the defense's request to call Dr. Hayes out of order and prior to the State's case-in-chief, and the Fourth Circuit denied writs finding no abuse of the trial court's discretion. *See* Fourth Cir. No. 2012-K-0908 (La. App. 4th Cir. June 18, 2012).

A jury was selected on June 18, 2012, and the State began presenting its case the following day. On June 20, 2013, after a two-day trial, a unanimous jury found the defendant guilty as charged. On September 28, 2012, the defendant was sentenced to life imprisonment.

The defendant's conviction and sentence were affirmed on appeal. *See State v. Williams*, 2013-KA-0283 (April 23, 2014), reported at 137 So.3d 832. The defendant filed an application for supervisory writ with the Louisiana Supreme Court, which was denied on January 16, 2015. *State v. Williams*, 2014-K-1231 (La. Jan. 16, 2015), reported at 157 So.3d 1128. The defendant filed his Petition for Writ of Certiorari in the instant proceedings on April 14, 2015.

STATEMENT OF THE FACTS

In the early morning hours of April 10, 2011, Selvin Gonzales and his roommate, Carlos Sabillion, walked from their residence to a nearby gas station to buy some beer. While in the store, Gonzales, a Hispanic immigrant and construction worker who had been paid in cash that day, removed money from his pocket to purchase the beer. Sabillion testified that a man later identified as the defendant, accompanied by an associate, approached Gonzales and offered to sell him drugs. Gonzales made the purchase. However, prior to leaving the gas station, the older Sabillion convinced Gonzales to return the narcotics, and the defendant gave the victim his money back after a brief argument.

As Gonzales and Sabillion walked home, Sabillion noticed the defendant and his friend following on foot. As the defendant's associate stood watch on the corner, the defendant approached the men and pointed a gun at Gonzales. Gonzales pled for his life, and Sabillion ran. The defendant then shot Gonzales twice, killing him. Police recovered several .380 caliber casings from the scene, and the coroner retrieved .380 caliber ammunition from the victim's body.

Police obtained surveillance video from the gas station that captured the interaction between Gonzales and the perpetrator. Using the video, Sabillion identified a black male with dreads wearing a white shirt and blue jeans as the man who sold Gonzales the drugs and shot him as he walked home. After police released the video to the media, the defendant arrived at the police station and identified himself as the individual depicted in the surveillance footage. During questioning by NOPD Detective Andrew Packer, the defendant admitted to having shot Gonzales with a black .38 or .380 caliber handgun, but stated he did so in self-defense after the victim brandished an unknown object.

REASONS FOR DENYING THE PETITION

In *Batson v. Kentucky,* 106 S.Ct. 1712, 1727 (1986), this Court held that an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. If the defendant makes a prima facie showing of discriminatory strikes, the burden shifts to the State to offer racially-neutral explanations for the challenged members. The neutral explanation must be one which is clear, reasonable, specific, legitimate and related to the particular case at bar. *State v. Collier,* 553 So.2d 815, 820 (La.1989). If the race-neutral explanation is tendered, the trial court must decide, in step three of the *Batson* analysis, whether the defendant has proven purposeful discrimination. *Purkett v. Elem,* 115 S.Ct. 1769 (1995)(per curiam). A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. *Hernandez v. New York,* 111 S.Ct. 1859, 1868-69 (1991); *Batson,* 106 S.Ct. at 1724, n. 21.

The *Batson* explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. *Purkett,* 115 S.Ct. at 1771. The *Hernandez* court explained:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the [party's] explanation, the reason offered will be deemed race neutral.

Hernandez, 111 S.Ct. at 1866. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. *Purkett,* 115 S.Ct. at 1771; *Hernandez,* 111 S.Ct. at 1866.

In *Snyder v. Louisiana,* 128 S.Ct. 1203, 1208 (2008), the Court reemphasized the district courts' role under the third step of *Batson:* to carefully scrutinize the plausibility of the prosecutor's explanation for a peremptory strike by evaluating the prosecutor's credibility, assessing "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."

In the present case, after the first panel of *voir dire*, the State exercised peremptory challenges as to potential jurors Joseph, Butler, Villavaso, Marshall, Sansom, and Davis. The defense made a *Batson* challenge noting that all six strikes were used against African-Americans, and the State, at the request of the court, placed the following race-neutral reasons as to each potential juror on the record:

Joseph: "[S]he was the foreperson on a burglary that came back not guilty. She also was the person that first began the conversation about coercion, in talking about statements given by defendants. And she also said the testimony and evidence needs to be really strong if she's depending on an eyewitness."

Butler: "[H]e was just this month on a criminal trial where he returned, of four counts, I believe it was three not guilty verdicts . . . He also, when asked about statements given by defendants, was the first to offer up the possibility that the defendant may have been beaten outside of the interview room prior to confessing."

Villavaso: "Miss Villavaso was the first one to, I guess, mention cognitive ability. She's a special-ed teacher. She talked about mental ability of a person with regards to them giving a confession."

Marshall: "Mr. Marshall . . . went into a long conversation about someone may be taking the fall for another person and how one person may have a positive background and a person with a negative background would set up and, essentially, take the fall for the person who's going somewhere with their life. He also . . . was unable to give coherent answers; specifically a couple of questions Mr. Engelberg [defense counsel] even asked. He stared off into space."

Sansom: "[W]hen talking about the possibility of a life sentence and needing proof beyond a reasonable doubt . . . I believe Miss Burton said she wanted a higher level of proof. Mr. Sansom at that time began to nod his head in agreement . . . He was also on the case with Mr. Butler, where there were four counts and there were three not guilty verdicts on four counts . . . And he also have a response about people possibly admitting to stuff they didn't do."

Davis: "[T]here was a point where I thought him and Miss Patel [the prosecutor] were about to engage in an argument. She asked a question of him . . . And he said; that's not what I asked you. And had somewhat bad body language throughout after that interaction with Miss Patel. He went on to kind of talk about confessions and how people can have a certain mental state. And if they have a certain mental state and they're tired and they get drilled mentally, then they would just go ahead and confess to something that they didn't do."

The trial judge denied the defense's *Batson* challenges.

Following the second round of *voir dire*, the State excused jurors West, Carter, Washington, Jackson, and Ballard. The record reflects that during questioning by the State, West stated he disapproved of a detective misrepresenting what he knows to a suspect during an interrogation. Mr. Washington expressed the same sentiments during questioning by the defense and added that the police could trick a suspect into falsely confessing. Jackson's rap sheet indicted that he had a prior arrest, and he did not engage in conversation with the State

or the defense. Ballard stated she had served on a jury before but did not recall any details and appeared disinterested.

A prospective juror's inattentiveness and body language have been held to be valid race-neutral reasons for exercising a peremptory challenge. *State v. Williams*, 137 So.3d 832, 851 (La. App. 4th Cir. 2014), *writ denied*, 157 So.3d 1128 (La. 2015), citing *State v. Jacobs,* 32 So.3d 227, 234 (La. 2010). *See also United States v. Bentley-Smith,* 2 F.3d 1368, 1374 (5th Cir.1993); *State v. Coleman*, 970 So.2d 511, 151 (La. 2007). Additionally, prospective jurors who have potential ill will toward police may be peremptorily challenged. *State v. Williams*, 137 So.3d at 851, citing *State v. Jones,* 968 So.2d 1247, 1252 (La. App. 2nd Cir. 2007). Further, a prospective juror's prior criminal record is a legitimate race-neutral explanation for excluding a juror. *State v. Bender*, 152 So.3d 126 (La. 2014).

The defense raised a *Batson* objection noting that the five jurors excused from the second panel were African-American, and the court asked the State to articulate race-neutral reasons for the strikes as to Carter and Jackson. The court did not ask for a race-neutral reason as to West, Washington, and Ballard, finding their answers during *voir dire* and Ballard's body language to be sufficient reasons to exercise a peremptory challenge. The prosecutor gave the following reasons for excusing Carter and West, and in so doing, provided the reason for striking West, before being cut off by defense counsel:

Carter: With regards to Miss Carter . . . when the first panel was seated, the second panel – specifically Mr. West and Miss Carter – were seated not too far behind me. Mr. Engelberg [defense counsel] was asking for ratings of the New Orleans Police Department. Mr. West responded that he would give 'em a zero and started laughing about it. And Miss Carter was who he was talking to. She was laughing along with Mr. West, as well. During the actual voir dire of this panel, she appeared disinterested and kind of had a – you know, slouched down in the chair, as if she didn't want to be asked any questions. I specifically tried to limit my questions towards her because of what I had already heard prior to them –

Jackson: Mr. Jackson has a prior arrest; which was the reason we chose not to –

The trial judge in this case had the opportunity to observe and hear all of the potential jurors and was satisfied with the race-neutral reasons for excusing each stricken juror that were articulated by the State or obvious from the *voir dire* examination. While each side was limited to twenty minutes of questioning during the second panel, the trial court took note of the potential jurors' answers, tone of voice, and demeanor. The court found West, Washington, and Ballard's testimony, including the fact that Ballard had apparently served on a jury but had no memory of it, and Ballard's negative body language were sufficient racial-neutral reasons for the State to exercise peremptory strikes against these jurors.

The court asked the State to articulate reasons for the strikes as to Carter and Jackson. The trial court found the prosecutor's representations that Carter exhibited similar body language to Ms. Ballard and had earlier been joking with West about the NOPD's lack of trustworthiness to be credible. A juror's perception of the integrity of the NOPD was of paramount importance in this case. Finally, despite the fact that defense counsel made no request for the arrest records of Jackson, the State provided supporting documentation to the trial court, and the court reviewed that documentation and found it to be sufficient. The trial court's determination, which is entitled great deference, is amply supported by the record.

In his Petition for Writ of Certiorari, defendant complains strictly of the procedure employed by the trial court in taking notice of the prosecutor's obvious reasons for striking West, Washington, and Ballard without requiring that the prosecutor articulate his reasons on the record. Defendant is primarily to blame for the manner in which the *Batson* hearing was conducted. After the defense established a prima facie case of discrimination by noting that the State utilized eleven of its twelve peremptory challenges to strike African Americans from

the jury, the trial court commented that the establishment of a pattern of racially motivated peremptory challenges does not end the *Batson* inquiry.[2] The defense then commandeered the *Batson* hearing demanding that the prosecutor articulate his reason for striking Carter, who, according to counsel, had not spoken a single word during *voir dire*:

> MR. ENELBERG:
> One second. Again, I believe all these are African-American jurors, judge.
>
> THE COURT:
> Let me just say this. Just because the people are African American doesn't mean you can't strike them. Now, if you have a reason to believe that --
>
> MS. PARKER:
> Well, judge, I'd like to know the reason for Miss Carter. Because I never heard her open her mouth the entire time.
>
> MR. ENELBERG:
> One second. Again, I believe all these are African-American jurors, judge. And, judge, clearly, there's a pattern, 11 for 11. That's a pattern, judge.

Voir Dire Transcript, p. 268.

The trial judge found that West and Washington's statements during voir dire (disapproval of a detective misrepresenting facts to a suspect during an interrogation and concern by Washington that such a practice could trick a suspect into falsely confessing) and Ballard's testimony, including the fact that she had apparently served on a jury but had no memory of it, and her negative body language were acceptable reasons for the State to strike the jurors and asked the State for its reason for striking Carter and Jackson. *Voir Dire* Transcript, pp. 268-69. After the prosecutor provided his reasons for striking Carter (she started laughing when West gave the Police Department a zero rating and appeared disinterested), defense counsel challenged the veracity of the prosecutor's response: "Judge, she didn't say a word in that voir dire to give a race-neutral reason." *Id.* at 269. At that time,

[2] As the Court explained in *Batson*, "a 'pattern' of strikes against black jurors in the particular venire might give rise to an inference of discrimination." 106 S.Ct. at 1723.

the judge asked the prosecutor to give his reason for striking Jackson, and the prosecutor explained that Jackson had a prior arrest. Defense counsel objected that the rap sheet was not in evidence: "That's not on the record either, judge. Where are they getting these things?" *Voir Dire* Transcript, pp. 269-70. After the court noted its satisfaction with the reasons offered by the prosecutor for striking Carter and Jackson, defense counsel again objected to the lack of evidence to support the State's dismissal of these jurors: "We can only bring in things that's on the record, judge. And if it's outside, things are improper. . . . Judge, you can only take into consideration what comes out on the record in voir dire. And this --" *Id.* at 270-71. The judge noted that body language is not memorialized in the record and requested that the prosecutor furnish the court with a copy of Jackson's rap sheet, at which time defense counsel again objected to the rap sheet as hearsay evidence. *Id.* at 271. After reviewing the rap sheet, the court overruled the defense's Batson challenges to the Carter and Jackson strikes. *Id.* at 272. At that time, defense counsel insisted that **the court** state the reasons for striking "the *other* African Americans" (West, Washington, and Ballard), which the court refused to do. *Id.*

Despite the myriad of objections lodged by the defense during the *Batson* hearing, **at no time did the defense object to the fact that the prosecutor did not state his reasons for striking West, Washington, and Ballard or object to the trial court's taking judicial notice of the State's obvious reasons for striking these jurors.** Furthermore, assuming that it was improper for the court to *sua sponte* take notice of the State's reasons for striking these jurors, defendant has failed to allege, much less demonstrate, any prejudice suffered by this procedure. Once the court found that the reasons for striking the jurors were race-neutral, it was incumbent on defendant, as a part of the third *Batson* step, to prove that the reasons were

pretextual. With the exception of objecting to the fact that the record contained no evidence of the stricken jurors' body language or Jackson's rap sheet, the defense made no attempt to prove purposeful discrimination on the part of the prosecution, such as pointing out sitting white jurors that the State did not strike who made statements or displayed body language similar to that of the stricken African American jurors. The fact that defense made no attempt to prove purposeful discrimination leads to the inevitable conclusion that the State's reasons for striking the jurors were not pretextual.

The defendant argues that the procedure employed in the present case of the trial judge noting the State's obvious race-neutral reasons for excusing prospective jurors is prohibited by federal circuit jurisprudence, citing *Riley v. Taylor*, 277 F.3d 261 (3rd Cir. 2001), *Holloway v. Horn*, 355 F.3d 707 (3rd Cir. 2004), *Mahaffey v. Page*, 162 F.3d 481 (7th Cir. 1998), and *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004). The cases cited by defendant are inapposite to the present case. For example, in *Riley v. Taylor*, the prosecution offered race-neutral reasons for striking African American jurors, thereby satisfying its step two burden under *Batson*. Thus, *Riley* has no bearing on the present case.

In *Holloway v. Horn*, the trial court found no evidence sufficient to support a prima facie showing of discrimination, and the Commonwealth of Pennsylvania therefore was under no obligation to provide an explanation for striking African-American jurors. After the defendant unsuccessfully moved for a mistrial, the prosecutor elected to make a record of his reasons for several of the strikes. The prosecutor defended the strike of one venireperson on the ground that the prospective juror was a "black male juror approximately the same age as the defendant."[3] 355 F.3d at 724.

[3] The Third Circuit assumed for purposes of argument that the prosecutor's reference to the venireperson's race was to make the venireperson's race clear for the record: "Race, obviously, was impermissible, but we will

Following his murder conviction and death sentence, the affirmance of his conviction and sentence on direct appeal, and the denial of state post-conviction relief, the defendant sought a writ of habeas corpus. In the appeal of the habeas corpus action, the Third Circuit found that the Commonwealth's use of eleven of its twelve peremptory strikes to exclude African-Americans from the jury was sufficient to establish a prima facie case of discrimination and thus considered possible reasons the prosecution may have had for striking the juror in question. Noting that the prosecutor accepted three white jurors approximately the same age as the defendant and chose not to exercise a peremptory strike against four other white jurors of approximately the same age who ultimately did not serve on the jury, the Circuit found the prosecutor's explanation for striking the juror to be pretextual. *Holloway v. Horn*, 355 F.3d at 724-25. The Commonwealth defended the strike by looking to the *voir dire* transcript for information that might have motivated the prosecutor's decision beyond the reasons stated on the record. In particular, the Commonwealth noted that the stricken juror had indicated he lived in the neighborhood where the murder took place and knew some people around that neighborhood but not by name and suggested that "[t]he prosecutor could well have been concerned that [the juror's] similarity in age and his connections to the neighborhood could translate into familiarity with 'some of the people' involved in the case." *Holloway v. Horn*, 355 F.3d at 725. The Third Circuit refused to engage in such fanciful peradventure:

> This speculation, however, does not aid our inquiry into the reasons the prosecutor actually harbored for the [juror's] strike. *Batson* is concerned with uncovering purposeful discrimination, and where a prosecutor makes his explanation for a strike a matter of record, our review is focused solely upon

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assume that the prosecutor referred to Hackley's race merely as a concession that Hackley was black so that his race would be clear as a matter of record. Thus, we focus on the prosecutor's stated reasons of age and gender." 355 F.3d at 724.

> the reasons given. . . . Thus, the Commonwealth's attempt to recast the prosecutor's stated reasons must be rejected.

355 F.3d at 725. Accordingly, *Holloway v. Horn* stands for the proposition that a court should not attempt to ascertain a possible alternative reason that the prosecutor struck a prospective juror once the court has determined that the reason articulated by the prosecutor is pretextual.

Paulino presents another instance where the trial court took notice of the prosecution's apparent reasons for striking prospective jurors in determining whether the defendant had established a prima facie case of discrimination. 371 F.3d at 1089. The Ninth Circuit held that the process employed by the trial court to evaluate the defendant's objection contravened the procedure outlined in *Batson* since the trial court never permitted defense counsel to explain the basis for his objection in the first instance, instead, interrupting defense counsel and offering, *sua sponte*, its "speculation" as to why the prosecutor may have struck the potential jurors in question. 371 F.3d at 1089-90.

In *Mahaffey v. Page,* the defendant failed to meet his initial burden of proving prima facie discrimination, so the burden did not shift to the prosecution to articulate reasons for excusing the jurors: "Finally, because the trial court dismissed Mahaffey's *Batson* claim at the prima facie stage, the government was never required to articulate its actual reasons for striking the African-American jurors[.]" 162 F.3d at 482. The Seventh Circuit noted the distinction between "actual" and "apparent" reasons for excusing a juror and posited that some "apparent" reasons may be so obvious from the record as to relieve the prosecutor of the obligation of articulating the reasons for striking potential jurors, offering as an example the case where all of the excused jurors are attorneys:

> This difference between actual and apparent reasons is not one of semantics. Apparent reasons are those that are discernible on the record, regardless of whether they were the actual motivation for the challenges. As the Attorney General argued and the district court found, the apparent explanations were "directed to explaining the pattern of challenges" used during the jury selection. One could imagine a case in which all stricken jurors were attorneys, for example, in which the apparent explanation could negate an inference of race discrimination, regardless of whether the attorney status was the actual reason for each strike. In such a case, the apparent reasons might be sufficiently convincing that the court would not require the prosecutor to come forward with actual reasons.

Mahaffey v. Page, 162 F.3d at 484, n. 1. *See also United States v. Stephens*, 421 F.3d 503, 516 (7th Cir. 2005)("In *Mahaffey,* we provided the hypothetical in which all stricken jurors were attorneys, in which that apparent explanation could negate an inference of race discrimination regardless of whether the attorney status was the actual reason for the strike."). In *Rodriguez v. Lord*, 2001 WL 1223864, at *21 (S.D.N.Y. Oct. 15, 2001), *report and recommendation adopted*, 2004 WL 2149116 (S.D.N.Y. Sept. 22, 2004), the court, citing *Mahaffey,* upheld the trial court's procedure of considering obvious race-neutral reasons for striking jurors not articulated by the prosecutor:

> The Supreme Court counseled in *Batson* that "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Batson v. Kentucky,* 476 U.S. 79, 96, 106 S.Ct. 1712, 1723 (1986); *see also* cases cited at pages 40–41 & n. 45 above. In determining whether a prima facie case has been established, courts may consider race-neutral or gender-neutral reasons for striking a juror apparent in the record of the voir dire. *See, e.g., Mahaffey v. Page,* 162 F.3d 481, 483 n. 1 (7th Cir.1998) (recognizing existence of cases where apparent reasons for strikes would "negate an inference of discrimination," *i.e.,* where "the apparent reasons might be sufficiently convincing that the court would not require the prosecutor to come forward with actual reasons"), *cert. denied,* 526 U.S. 1127, 119 S.Ct. 1786 (1999); *Johnson v. Campbell,* 92 F .3d 951, 953–54 (9th Cir.1996) (considering "obvious reason" for the peremptory challenge in determining whether prima facie *Batson* case was established); *Capers v. Singletary,* 989 F.2d 442, 446–47 (11th Cir.1993) ("Guided by *Batson* ..., we conclude that the district court did not err by considering the probable reasons for the state's challenges when determining whether the defendants had established a prima facie showing ...."); *United States v. Jackson,* No. 92–

> 5215, 983 F.2d 1069 (table), 1993 WL 8152 at *3–4 (6th Cir. Jan. 15, 1993) (despite statistical evidence, "there were more factors tending to refute the inference of discrimination than those supporting it"), *cert. denied,* 508 U.S. 913, 113 S.Ct. 2350 (1993); *Bailey v. NYC Dep't of Transp.,* 93 Civ. 1121, 1998 WL 472010 at *1 (S.D.N.Y. Aug. 3, 1998) (Sand, D.J.) (in employment discrimination case, declining to inquire as to defendant's reasons for striking juror where, *inter alia,* "there were obvious non-race related grounds on which the defendant might find [the juror] undesirable"), *aff'd mem.,* 173 F.3d 843 (2d Cir.1999); *Millan v. Keane,* 97 Civ. 3874, 1999 WL 178790 at *5–7 (S.D.N.Y. Mar. 31, 1999) (the trial court properly inferred from the prosecutor's statements, questions during voir dire and the fact that "the defendant, the victim, and all of the eyewitnesses" were Hispanic that "the circumstances of this case did not suggest any motive that would have led the prosecutor to exercise peremptory challenges in a discriminatory fashion"), *aff'd mem.,* 208 F.3d 203 (2d Cir.2000), *cert. denied,* 531 U.S. 1084, 121 S.Ct. 789 (2001).

More recently, the Seventh Circuit sanctioned such a procedure in *Franklin v. Sims*, 538 F.3d 661, 665-66 (7th Cir. 2008):

> In addition, *Johnson* limited the ability of appellate courts to consider, at the prima facie stage, the apparent reasons for the challenges discernible from the record. We have explained that after *Johnson,* "an inquiry into apparent reasons [at the prima facie stage] is relevant only insofar as the strikes are so clearly attributable to that apparent, non-discriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes." *Stephens,* 421 F.3d at 516; *accord Williams v. Runnels,* 432 F.3d 1102, 1108-09 (9th Cir.2006) (likewise in light of *Johnson* limiting the inquiry into so-called "apparent" reasons for strikes at the prima facie stage); *see, e.g., Mahaffey v. Page,* 162 F.3d 481, 483 n. 1 (7th Cir.1998) (hypothesizing as an example that all the stricken panelists were lawyers). Thus, for example, we concluded in *Stephens* *666 that the defendant had made out his prima facie case without reference to the government's post hoc reasons, which consisted of a combination of the stricken jurors' encounters with law enforcement officials, their criminal histories, and their litigation histories. *See Stephens,* 421 F.3d at 517-18.

The State submits that *Mahaffey* and its progeny support its argument that a trial judge may take judicial notice of race-neutral reasons for striking potential jurors, such as was done with respect to the peremptory strikes of West, Washington, and Ballard, that are obvious

from the the *voir dire* examination without requiring that the prosecutor articulate the reasons for striking the jurors.

CONCLUSION

Based on the foregoing, Petitioner has failed to present compelling reasons why this Court should exercise its discretionary jurisdiction in the instant case. Accordingly, the State of Louisiana, respondent herein, respectfully submits that certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Amicus Curiae Brief has been served upon the following counsel of record, the Louisiana Supreme Court, the Louisiana Circuit Court of Appeal, and the trial judge by placing same in the U.S. mail, properly addressed, with first class postage affixed thereto, this 24th day of June, 2015:

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