***** CAPITAL CASE *****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MCCOY, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

1. Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection?

2. Whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holding in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert McCoy respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his convictions and death sentences.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming Mr. McCoy's conviction and sentence is at *State v. McCoy*, 2014-1449 (La. 10/19/2016); ___ So. 3d. ___; 2016 La. LEXIS 2107, and is reprinted in the Appendix at App. A.

The opinion of the Louisiana Supreme Court denying rehearing is at *State v. McCoy*, 2014-1449 (La. 12/6/2016); ___ So. 3d. ___; 2016 La. LEXIS 2485, and is reprinted in the Appendix at App. B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257. The Louisiana Supreme Court denied Petitioner's appeal on October 19, 2016. The Louisiana Supreme Court denied Petitioner's application for rehearing on December 6, 2016. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution and the Louisiana Code of Criminal Procedure:

AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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

LA. C. CR. P. ART. 795. 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 or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender 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 race or gender 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.

STATEMENT OF THE CASE

A. Introduction

Petitioner Robert McCoy was convicted of three counts of first degree murder on August 4, 2011. Following a penalty phase, the jury returned a verdict of death on each of the three counts and Mr. McCoy was formally sentenced to death in accordance with the jury's verdict on January 23, 2012.

His convictions and sentences were affirmed on direct appeal by the Louisiana Supreme Court in 2016, *State v. McCoy*, 2014-1449 (La. 10/19/2016); ___ So. 3d. ___ reh'ng denied (La. 12/6/16).

Mr. McCoy was convicted and sentenced to death after his counsel conceded his guilt over his repeated, timely and express objections. The jury that convicted and sentenced Mr. McCoy to death was tainted by the prosecution's racially discriminatory peremptory challenges but Mr. McCoy was prevented from presenting relevant evidence of the prosecutor's discriminatory intent by an unconstitutional Louisiana law.

Mr. McCoy now petitions this Court for a writ of certiorari to the Louisiana Supreme Court to reverse his convictions and sentences as they were obtained in violation of his Sixth and Fourteenth Amendment rights.

B. Factual background relevant to question one

Mr. McCoy was arrested on May 9, 2008 for the first degree murders of the son, mother, and step-father of his estranged wife in a May 5, 2008 shooting. App. A, 2-3.

On May 15, 2008, following his extradition from Idaho, Mr. McCoy was found to be indigent and appointed a public defender. App. A, 4.

Throughout his representation by the public defender and his subsequent representation by retained counsel Mr. McCoy steadfastly and adamantly maintained his innocence, and repeatedly stated his desire to plead not guilty, to go to trial, to advance his innocence claim and ultimately, to secure a complete acquittal.

In December 2009 Mr. McCoy moved for his public defender to be removed due to his belief that the public defenders were doing nothing to assist him in proving his innocence, resulting in a breakdown in their relationship. App. A, 4. Mr. McCoy sought to represent himself until he could retain counsel. App. A, 4. Following a *Faretta*[1] hearing on February 11, 2010, Mr. McCoy was permitted to represent himself on the understanding that he would represent himself through trial if he did not retain counsel. App. A, 4-5.

On March 2, 2010, Mr. Larry English enrolled on behalf of Mr. McCoy as retained counsel after Mr. McCoy's parents paid him $5,000 they had borrowed against their car title. App. A, 5, 11-12.

Trial was ultimately set for July 28, 2011 and about a month prior to trial, defense counsel visited with Mr. McCoy to tell him that his case could not be won and that he needed to take a plea. App A, 14; VI.724.[2] Mr. McCoy adamantly refused to take a plea.

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[1] *Faretta v. California*, 422 U.S. 806, 834 (1975)

[2] References to the Louisiana appellate record refer to volume number and page.

On July 12, 2011, only two weeks prior to trial, a hearing was held at which Mr. English stated that he would not offer any alibi evidence, despite Mr. McCoy's *pro se* alibi notice, and declined to adopt any of the subpoenas Mr. McCoy had filed. App. A, 6-7.

Immediately after the court hearing, Mr. English visited Mr. McCoy in the cells and told him for the first time that he intended to concede that Mr. McCoy was the killer. Mr. McCoy emphatically opposed this course. Mr. English provided undisputed testimony, describing the encounter:

> 9. On July 12, 2011 I met with Robert at the courthouse and explained to him that I intended to concede that he had killed the three victims in the guilt phase of his trial in an effort to save his life. This was the first time that I had told Robert that I intended to concede to the jury that he was the killer. Robert was furious and it was a very intense meeting. He told me not to make that concession but I told him that I was going to do so. I explained that I felt I had an ethical duty to save his life, regardless of what he wanted to do. I ended the meeting as it was becoming too intense. This was essentially the end of our professional relationship. From that time on he saw me not as his lawyer but as his enemy - part of the system that was conspiring to convict him of a crime he believed that he had not committed.
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> 10. I next went to see Robert at Bossier Max on the weekend before trial was due to start. Robert came out to the interview but expressed surprise and frustration that I was there. He told me that he had already fired me and that I had no business on his case anymore. Robert told me that he had arranged for two other lawyers to come onto the case to replace me. He remained very angry with me and felt that I had betrayed him. Robert made it very clear that he believed that he was entitled to discharge me as his counsel and that he had done so. This was a relatively short interview. I tried to see him again on the Monday but he refused to see me-
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> 11. I know that Robert was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in

> Louisiana at the time of the killings, as he insisted. I consulted with other counsel and was aware of the Haynes case and so I believed that I was entitled to concede Robert's guilt of second degree murder even though he had expressly told me not to do so. I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. I believed the evidence to be overwhelming and that it was my job to act in what I believed to be my client's best interests.

Appellate Record VI.724-5; XVII.3802-10.[3]

On Tuesday, July 26, 2011 the trial court conducted a hearing on Mr. McCoy's desire to discharge Mr. English. App. A, 7. The court denied Mr. McCoy's request to discharge Mr. English as untimely, given that substitute counsel were not present and trial was due to start in two days.[4] App A, 7. Mr. McCoy immediately sought to represent himself but the trial court cut him off, refusing to entertain the request on the basis that it was untimely:

> MR. MCCOY: Through *Ache [sic] versus Oklahoma*, Your Honor, I have the right to speak, I have a right to represent myself through *Ache [sic] versus Oklahoma*, Your Honor, and too –
>
> THE COURT: Not at this time, Mr. McCoy, the *State versus Bridgewater* [case] states that you have unequivocally given up that right because . . . you have not made that known to the Court unequivocally before this date. So I will instruct you to speak through Mr. English at this time and . . . Mr. English is your attorney and he will be representing you . .

App A., 7, 15; VIII.1672.

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[3] The Louisiana Supreme Court acknowledged that Mr. English acted against Mr. McCoy's express wishes but did not detail the evidence of their communications in its opinion, presumably because it attached no constitutional significance to Mr. McCoy's objections. App. A, 21. At the motion for new trial hearing, Mr. English swore in his declaration as his direct evidence and was then subject to cross-examination and re-direct. XVII.3802-10; VI.723-7 (Declaration of Larry English).

[4] At the motion for new trial hearing, defense counsel introduced Sheriff's Office recordings of jail calls from Mr. McCoy to his father. Following his July 12, 2011 meeting with Mr. English, Mr. McCoy asked his father to find substitute counsel and was assured that counsel had been secured and would be present at court. XVII.3840, Ex. B (Recorded jail calls).

Mr. English then sought guidance from the trial court, advising that contrary to Mr. English's intention, Mr. McCoy wished a defense to be presented in the guilt phase of his trial and the trial court ruled that as Mr. English was the attorney, it was for Mr. English to make the decision of what defense he would proceed with at trial:

> MR. ENGLISH: Your Honor, at this time I'm going to ask for an ex parte hearing with the Court to discuss my representation with Mr. McCoy . . . . Mr. McCoy is insistent that I put forward a defense in this case at the guilt phase of this trial. I have made a determination, Your Honor, that the evidence in this case is so overwhelming against Mr. McCoy that in order to do that . . . .
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> * * *
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> THE COURT: . . . I think that you've stated this on the record prior to this date . . . . I believe that - you are the attorney, sir . . . . And you have to make the trial decision of what you're going to proceed with . . . .

App. A, 20; VIII.1675-6.

Opening statements in the guilt phase were conducted on August 3, 2011. During his opening statement, Mr. English explicitly and repeatedly conceded that Mr. McCoy had murdered the three deceased, "I'm telling you, Mr. McCoy committed these crimes." App. A, 7, 21. Mr. English argued for verdicts of second degree murder on a theory of diminished capacity: a theory wholly foreclosed by Louisiana law.[5] App. A, 7, 23.

[5] As the Louisiana Supreme Court discusses at App. A, 23, n.35, Louisiana does not recognize a defense of diminished capacity and, absent a plea of not guilty by reason of insanity, a defendant may not introduce evidence of mental defect at the time of the crime. *See also State v. Dressner*, 08-1366 (La. 7/6/10), 45 So. 3d 127, 143-44; *State v. Holmes*, 06-2988 (La. 12/2/08), 5 So. 3d 42, 74.

Mr. McCoy immediately interrupted defense counsel's opening statement and renewed his objection to being represented by Mr. English and to Mr. English's concession of guilt:

> Judge Cox, Mr. English is simply selling me out, Judge Cox. They know cops killed these people, Judge Cox, and you want me to sit here, Judge Cox, and just let this man throw away all aspects of my due process. I have told you about Mr. English, Your Honor. I tried to get Mr. English removed, Your Honor, and you still kept Mr. English on my case, Your Honor, when I told you Mr. English was not putting up any type of defense for me. He's sitting there vindicating, Your Honor, that I murdered my family. I did not murder my family, Your Honor. I had alibis of me being out of state. Your Honor, this is unconstitutional for you to keep an attorney on my case when this attorney is completely selling me out, Your Honor.
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> * * * *
>
> I don't want him to represent me, Your Honor.

XV.3269.[6]

Mr. McCoy exercised his right to testify in his own defense, asserting his complete innocence, testifying to his alibi, refuting the State's evidence and describing a drug trafficking ring headed by law enforcement personnel that was responsible for the killings and for framing him. App. A, 7-8.

In closing argument, defense counsel once again repeatedly and emphatically argued that Mr. McCoy murdered the three victims ("He killed them") and explicitly stated that he had relieved the State of its burden of proof and the jury of its burden in this regard ("I took that burden off of Mr. Marvin. I took that burden off of you.").[7]

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[6] The Louisiana Supreme Court references this interruption when describing Mr. McCoy's behavior at trial but, consistent with its view that Mr. McCoy's objection to counsel's actions is irrelevant, did not include in its opinion the text of Mr. McCoy's objection. App. A, 49.

[7] Record quotes appear at XVI.3526, 3530. Mr. Marvin is the name of the District Attorney.

App. A, 21, 43. Defense counsel argued that Mr. McCoy was so mentally defective as to be incapable of forming specific intent and that the verdict should therefore be guilt of second-degree murder. App. A, 21, 43. Once again, Louisiana law wholly forecloses this argument and a lesser verdict could only be returned through juror nullification.[8] App. A, 23, 24.

The jury returned a unanimous verdict of first degree murder on all three counts. App. A, 7. The penalty phase lasted one day, with the State calling five witnesses and the defense calling one witness. App. A, 8. The jury returned three death verdicts. App. A, 8.

Following trial, indigent capital defense counsel were appointed and filed a Motion for New Trial raising claims arising from the involuntary representation by Mr. English and the concession of guilt. App. A, 8. After an evidentiary hearing at which Mr. English provided the evidence described above, the motion for new trial was denied. App. A, 8.

On direct appeal, Mr. McCoy raised a series of interlocking claims arising from the refusal to relieve Mr. English, the denial of self-representation and defense counsel's concession of guilt over the client's objection.

The Louisiana Supreme Court denied the appeal, affirming the convictions and death sentences. App. A, *State v. McCoy*, 2014-1449 (La. 10/19/2016); ___ So. 3d. ___; 2016. The Louisiana Supreme Court held that:

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[8] Louisiana recognizes the power of juries to nullify and return a responsive verdict of guilty of a lesser offense even though the evidence clearly and overwhelmingly supports a conviction of the charged offense. *State v. Porter*, 93-1106 (La. 7/5/94); 639 So. 2d 1137, 1140. However, defense counsel did not seek and the jury did not receive any instruction to this effect in this case.

- Mr. McCoy's request to discharge Mr. English was untimely, as it arose on the eve of trial (App. A, 13);
- Mr. McCoy's request to represent himself was untimely and given that it was only one sentence long, was not sufficiently unequivocal (App. A, 15, 16);
- the trial court did not err in ruling that retained counsel could decide to concede guilt over his client's objection where conceding guilt was a reasonable strategy in the face of overwhelming evidence (App. A, 20);
- defense counsel's failure to follow Mr. McCoy's direction not to concede guilt did not deny Mr. McCoy the assistance of counsel or create a conflict of interest because Mr. English did not completely abdicate Mr. McCoy's defense. Mr. English advanced what he saw was the only viable course of action and, in light of *Nixon*,[9] Mr. McCoy had not shown that trial counsel's actions were ineffective (App. A, 22-4); and,
- Mr. McCoy's several Sixth Amendment rights to present a defense along with his rights to an impartial jury and Due Process were not violated because the concession of guilt did not waive Mr. McCoy's constitutional rights but instead was a strategic choice by counsel (App. A, 25).

[9] *Florida v. Nixon*, 543 U.S. 175 (2004).

C. Factual background relevant to question two

Following death qualification, fifty-eight qualified jurors were questioned as a part of general voir dire and were subject to acceptance or peremptory challenge. App. A, 36. Of those fifty-eight, ten were African-American. App. A, 36. Five of these jurors were struck for cause. Of the remaining five African American jurors, the State exercised peremptory challenges against four and accepted one (jurors Curry, Venus, Landry, McWashington and Mitchell). App. A, 36-7.[10] The resulting jury was comprised of eleven white and one African-American jurors. App. A, 36.

The State struck four African-American jurors, the second of whom, Ms. Venus, was a strongly pro-death penalty proponent who was simultaneously struck by the defense. App. A, 36-7. The defense raised a *Batson*[11] objection in respect of the state's strikes and argued that while the defense did not want Ms. Venus reseated, the State's strike of such a pro-death juror was strong evidence of discriminatory intent. *Id.* The trial court accepted the State's submission that as a result of the simultaneous strike of Ms. Venus: the State could not be asked to provide reasons for the strike of Ms. Venus; her strike could not be considered in establishing a *prima facie* case; and, her strike could not be considered as part of the proof of discriminatory intent. *Id.*; XIV.3117.

[10] The Louisiana Supreme Court's opinion describes the outcome for eight of the African American jurors. By way of completeness, the appellate record further shows that Ms. Eason was struck by the State for cause (XII.2694-5) and Ms. Thomas was struck jointly for cause (XII.2781).

[11] *Batson v. Kentucky*, 476 U.S. 79 (1986).

The defense *Batson* challenge was revisited in the motion for new trial and the defense presented evidence that demonstrated that in trials conducted from January 2007 to July 2011, the Bossier Parish District Attorney's Office struck African Americans at almost two and a half times the rate it rejected white jurors. App. A, 41. The trial court denied the motion for new trial, a ruling the Louisiana Supreme Court upheld, citing its own jurisprudence rejecting reliance upon statistical data in *Batson* cases. App. A, 41.

On appeal, Mr. McCoy argued that the trial court had erred and, in particular, that the trial court had erred in refusing to include in the *Batson* analysis the State's strike of Ms. Venus. App. A, 37-8. The Louisiana Supreme Court ruled that under La. C. Cr. P. art. 795, because Ms. Venus was simultaneously struck by the defense, her strike would not be considered when assessing the other *Batson* objections she was not part of the *Batson* equation:

> Further, the defendant's argument on appeal, that the State's peremptory challenge of Ms. Venus should be considered when evaluating the State's peremptory challenge of Ms. Curry, ignores the clear directives of LSA-C.Cr.P. art. 795(D) to the contrary, given that the defense simultaneously challenged the same juror. Although Paragraph (C) of Article 795 authorizes the trial court to demand a race neutral reason for the exercise of a peremptory challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror, Paragraph (D) of Article 795 provides that 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." Because Ms. Venus was peremptorily challenged by both the State and the defense, the trial court was not required to order the articulation of race neutral reasons, pursuant to LSA-C.Cr.P. art. 795(D), and we find no *Batson* violation apparent in the peremptory strike of Ms. Venus.
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> * * * *

> In the instant case, the defendant has not borne his burden under *Batson*. At a point when three African-Americans had been struck peremptorily from the twelve-person jury, the judge acquiesced in the suggestion that the State should articulate reasons; however, it should be noted that, of the two African-American females in that number, one was strongly opposed to the death penalty (Ms. Curry), and the other was struck simultaneously by the State and the defense (Ms. Venus), and thus, was not part of the *Batson* equation, pursuant to LSA-C.Cr.P. art. 795(D).

App. A, 38, 41.

The Louisiana Supreme Court ultimately held that "[n]either the numbers nor the facts support a prima facie showing that the State based its peremptory challenges on race" and that the trial court had not abused its discretion in rejecting the *Batson* objections. App. A, 41.

REASONS FOR GRANTING THE PETITION

I. [Question 1] This Court should decide whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

A. The Louisiana Supreme Court held that counsel may concede guilt if it is a reasonable strategy, even if the concession is made over the express objection of the client

The Louisiana Supreme Court held that counsel's concession of guilt over Mr. McCoy's objection should be analyzed as a claim of ineffective assistance of counsel to be assessed under *Strickland*.[12] App. A, 21. In doing so, the Louisiana Supreme Court did not attach any constitutional significance to the fact that counsel was acting against his client's express instructions.

[12] *Strickland v. Washington*, 466 U.S. 668 (1984).

The Louisiana Supreme Court held that *Cronic's*[13] presumption of prejudice did not apply because defense counsel "did not completely abdicate the defendant's defense, rather Mr. English advanced what he saw was the only viable course of action." App. A, 22.[14]

The Louisiana Supreme Court directly applied this Court's decision in *Florida v. Nixon*, once again, placing no significance on the fact that Mr. McCoy had expressly objected to the concession of guilt. Applying *Nixon*, the Louisiana Supreme Court concluded that as "admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy," Mr. McCoy had not shown that trial counsel's actions were ineffective. App. A, 24.

For the same reason, the Louisiana Supreme Court affirmed the trial court's ruling that defense counsel, rather than the client, had the authority to determine whether to present a guilt-based defense. App. A, 20.

The effect of the Louisiana Supreme Court's decision is to hold that defense counsel may concede the guilt of a client, even over the express objection of the client.

B. This Court has not addressed the question presented in this case but the Louisiana Supreme Court's decision conflicts with the decisions of other state courts of last resort

In *Florida v. Nixon*, this Court addressed a narrow question of whether counsel must obtain explicit consent before conceding guilt in a capital case. Rejecting the

[13] *United States v. Cronic*, 466 U.S. 648 (1984).

[14] The Louisiana Supreme Court also observed that defense counsel remained active at trial, bringing a *Batson* objection and cross-examining some witnesses. App. A, 22-3.

need for explicit consent, the Court held that that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Nixon*, 543 U.S. at 192.

However, the Court did not address the present situation, where defense counsel informs the defendant of the proposed strategy of conceding guilt and, far from being unresponsive, the defendant vehemently opposes the strategy and directs counsel not to make the concession.

In the present case, the Louisiana Supreme Court concluded that *Nixon* applied even where the client expressly opposed the concession of guilt and that counsel was free to override the client's wishes as long as a concession of guilt might otherwise represent a reasonable strategy.

Other courts to have considered this important federal question have reached decisions conflicting with that of the Louisiana Supreme Court.

In *Cooke v. State*, 977 A.2d 803 (Del. 2009), the Delaware Supreme Court reversed the conviction and death sentence of a prisoner whose counsel argued for a verdict of "guilty but mentally ill" over the express objections of his client who wished to pursue an outright "not guilty" defense. The Delaware court held that counsel could not concede guilt over the client's express objection and that counsel's override of the client's objective "negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole." *Id.* at 849.

In *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010), the Colorado Supreme Court held that "[c]ounsel cannot concede the defendant's guilt to a crime over his express objection," distinguishing *Nixon* on the basis of the client's explicit objection to counsel's actions (and because *Nixon* was a capital case).

In *State v. Humphries*, 336 P.3d 1121 (Wash. 2014), the Washington Supreme Court held that while defense counsel can consent to a stipulation to an element of the offense without an accompanying colloquy between the defendant and the trial court, "such a decision may not be made over the defendant's known and express objection." *Id.* The Washington Court maintained that counsel may enter a stipulation and the court may presume consent from the defendant's silence but that "this presumption disappears where the defendant expressly objects." *Id.* at 1125 citing *United States v. Williams*, 632 F.3d 129 (4th Cir. 2011)(reversing where defense counsel's stipulation of an element was made over the defendant's express objection). The *Humphries* Court also rejected the proposition that the caselaw permits counsel to concede guilt in closing over the defendant's objection. *Id.* at 1126, n.4.

In *State v. Carter*, 14 P.3d 1138 (Kan. 2000), the Supreme Court of Kansas held that counsel's concession of guilt over the defendant's objection violated the Sixth Amendment and the Due Process Clause and that prejudice should be presumed. The Kansas Court held that counsel could not impose a guilt-based defense against counsel's wishes and that in doing so, counsel "was betraying the defendant by deliberately overriding his guilty plea". *Id.* at 1148. The Kansas Court also faulted

the trial court for treating the decision as tactical and held that the trial court should have granted the defendant's request to appoint different counsel. *Id.*

In *State v. Anaya*, 592 A.2d 1142, 1145 (N.H. 1991), counsel conceded guilt of a lesser offense, despite the defendant's objection and his sworn testimony of complete innocence. The New Hampshire Court held that the Sixth Amendment question turned upon whether the defendant objected to counsel's concession or whether the concession was authorized. *Id.* at 1146. Finding that the defendant had objected, the New Hampshire Court held that the concession of guilt of a lesser offense over the client's objection violated the defendant's right to the assistance of counsel and that prejudice should be presumed. *Id.* at 1146.

Following *Nixon*, the Supreme Court of North Carolina has continued to endorse its pre-*Nixon* rule that a concession of guilt without the defendant's informed consent is *per se* ineffective. *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (Counsel's admission of guilt without informed consent deprives the defendant of the right to a fair trial and requires reversal); *State v. Maready*, 205 N.C. App. 1, 9-10 (N.C. Ct. App. 2010)(subsequent to *Nixon*, the North Carolina Supreme Court has continued to apply the analysis set forth in *Harbison*, even in death penalty cases")(gathering cases).

In *United States v. Dago*, 441 F.3d 1238 (10th Cir. Colo. 2006), the Tenth Circuit affirmed its pre-*Nixon* opinion that "The admission by counsel of his client's guilt to the jury . . . represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *Dago*, 441 F. 3d at

1250 (quoting *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995)). In *Williamson*, the Tenth Circuit had gathered authorities to illustrate which types of argument by defense counsel would amount to a concession of guilt for these purposes, all of which are equivalent to or exceeded by the concession in Mr. McCoy's case. *Williamson*, 53 F. 3d at 1511.

Prior to *Nixon*, the Fifth Circuit Court of Appeals addressed the issue in reviewing a habeas corpus petition from a Louisiana prisoner under the Anti-Terrorism and Effective Death Penalty Act. *Haynes v. Cain*, 298 F.3d 375 (5th Cir. La. 2002). In *Haynes*, counsel conceded guilt of second-degree murder but argued that the evidence did not prove specific intent to kill, such that first-degree murder was not established. Addressing whether the *Cronic* or *Strickland* standard should apply, the majority held that it is the "distinction between conceding the only factual issues in dispute and acknowledging that the evidence establishing a lesser included offense is overwhelming that is at the core of the *Strickland*/*Cronic* distinction in this context." *Id.* at 380, n.6. Going further than the Louisiana Supreme Court, the *Haynes* majority accepted that the failure of trial counsel to obtain the defendant's consent may constitute deficient performance but went on to find that the state court was not unreasonable in concluding that prejudice had not been established under *Strickland*. *Id.* at 382-3. The dissent would have found the express objection of the client to be dispositive. *Id.* at 386-7.

More recently, the Fifth Circuit, having regard to this Court's approach in *Nixon*, has suggested that the defendant's express objection may, in fact, be

controlling. *Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) ("Here, however, the trial judge afforded Woodward an opportunity to express disagreement with his counsel's tactics on the record, which he did not. Had Woodward expressed disagreement with his counsel's strategy, this might present a closer question as to whether *Cronic's* presumption of prejudice applies. We find that Strickland's standard applies here.")(citing *Nixon*).

C. Mr. McCoy's case presents an excellent vehicle for the resolution of this important constitutional question, being presented in an appellate posture with an undisputed factual record in a death penalty case

The question presented addresses an important question of federal constitutional law which should be, but has not been, settled by this Court and as to which state courts of last resort conflict.

The case comes before this Court on review of a direct appeal decision but, as a result of the motion for new trial proceedings, also provides an undisputed factual record, including the attorney-client communications in which the client clearly objected to counsel's proposed course. Counsel's concession of guilt in this case in opening and closing was repeated and thorough.

The Louisiana Supreme Court has directly addressed the constitutional issues and held that the federal constitution authorizes capital counsel to concede guilt over their client's express objections. If this is a legitimate course for counsel to adopt, then it is one that all reasonably effective capital counsel must actively consider in each case or themselves risk providing ineffective assistance.

In the absence of this Court's intervention, Mr. McCoy will be eligible for execution based upon a trial in which his own lawyer told the jury he was guilty despite Mr. McCoy's protestations of innocence.

The death penalty, by its nature, demands an "especially vigilant concern for procedural fairness and for the accuracy of factfinding" and "a correspondingly greater degree of scrutiny of the capital sentencing determination." *Monge v. California*, 524 U.S. 721, 732 (1998); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

A trial in which counsel concedes guilt over his client's protestations of innocence cannot hope to meet these standards, containing even less adversarial testing than a case in which a defendant is forced to proceed without counsel. *cf. Cronic* ("Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.") quoting *Betts v. Brady*, 316 U.S. 455, 476 (1942) (Black, J., dissenting).

A grant of certiorari is for these reasons all the more appropriate.

D. The constitutional rights at issue are of fundamental importance and the Louisiana Supreme Court's ruling runs contrary to the text and history of the rights guaranteed by the Sixth Amendment

In *Faretta*, this Court emphasized that the right to make a defense is personal to the accused, and does not merely provide "that a defense shall be made for the accused" but instead that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20.

The Court held that the counsel provision supplements the overall design of the Sixth Amendment, which grants the right to defend to the accused personally. *Id.* at 820. The Court emphasized that the text of the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* The Court went on to describe the counsel guaranteed by the Sixth Amendment as a defense tool intended to "be an aid to a willing defendant" and rejected the idea that the personal character of the right to make a defense could be stripped away by transforming the counsel intended to be an assistant into the master. *Id.*

Reviewing the Sixth Amendment's roots in English legal history, the Court confirmed that the right of an accused to make his defense existed long before a right to counsel and was not intended to be replaced by the introduction of a right to act through counsel. *Id.* at 824-6.

Reviewing the legal and political context in the colonies, the Court found that the Sixth Amendment was drafted against a backdrop of distrust of lawyers and a commitment to the natural law thinking that saw the right of pleading through counsel as an appendage to the natural right to plead one's own cause. *Id.* at 826-30.

Summing up, this Court stated that "the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself." *Faretta*, 422 U.S. at 832.

The choice to use the tool of counsel to assist in one's defense does not and was never intended to extinguish the more fundamental, personal right to make a defense, even if counsel advises that making a defense is a bad idea. *Faretta* v, 422

U.S. at 833-834 ("And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.")

Furthermore, granting counsel authority to override the accused in this regard would sever the constitutional guarantee of assistance of counsel from the historic roots of the concept of counsel, which lie in a relationship of principal and agent. *Faretta*, 422 U.S. at 821.

This Court has consistently analyzed the relationship between client and lawyer as one between principal and agent and applied principles of agency law.[15] The principles of agency anticipate that counsel will comply with the client's lawful instructions, that the client may limit the lawyer's authority by contract or instructions and that the client, not the lawyer, sets the goals of the representation.[16] The Rules of Professional Conduct in virtually every state also provide that the lawyer shall abide by a client's decision concerning the objectives of representation.[17]

This Court has held that as a practical matter, an attorney operates with implied authority to manage the conduct of the trial without needing to obtain the

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[15] *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962) citing *Smith v. Ayer*, 101 U.S. 320, 326 (1880); *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005); *Gonzalez v. United States*, 553 U.S. 242, 257 (2008)(Scalia J. concurring); *Maples v. Thomas*, 565 U.S. 266, 280-1 (2012).

[16] *Restatement (Third) of Agency* §1.01 (2006); *Restatement (Third) of Law Governing Lawyers* (hereafter *Restatement Lawyers*), § 16, comment *c*, § 21, cmt. b (2000).

[17] Model Rules of Professional Conduct, Rule 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . ."). This rule or its equivalent has been adopted in every state, save California, which has structured its rules substantially differently from the Model Rules. *See also Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983)(Citing proposed Model Rule 1.2 with approval).

defendant's consent prior to each tactical decision. *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988); *Faretta*, 422 U.S. at 820.

However, it does not logically follow, that an attorney may also take action on behalf of the client over the client's express objection. *Gonzalez v. United States*, 553 U.S. 242, 254 (2008)(Scalia J., concurring)("we are not speaking here of action taken by counsel over his client's objection--which would have the effect of revoking the agency with respect to the action in question."); *Restatement Lawyers* § 23, cmt. C ("However, a lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action.")[18]

Particularly for decisions concerning the objectives of representation, the attorney-agent must act within the lawful instructions of the client-principal. *Banks*, 543 U.S. at 436 (while a client relies upon the attorney's expertise and skill, the client retains "ultimate dominion and control over the underlying claim").

As this Court stated in *Cronic*, "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at 657. The Louisiana Supreme Court's holding is completely at odds with this basic proposition.

[18] The same historical source relied upon by members of this Court in discussing our unitary competency standard recognizes the prisoner's authority "to instruct counsel, or to withdraw his authority if he acts improperly, as a prisoner may always do." *Godinez v. Moran*, 509 U.S. 389, 405 (1993) (Kennedy J. concurring) citing *Regina v. Southey*, 4 Fos. & Fin. 864, 872, n. a, 176 Eng. Rep. 825, 828, n. a (N. P. 1865). Indeed, the prisoner's authority in this respect, justified the need for trial competency.

It is inconceivable that the Framers intended that the assistance of counsel should come at the price of defense counsel being authorized to tell the jury that the accused is guilty, even over the accused's protestations of his own innocence.

In addition to the violence that such a notion does to the Sixth Amendment's guarantee of a personal right to make a defense, it also radically changes the role of an independent bar in our constitutional democracy.

Charged with the power to override the client's protestations of innocence, counsel are less well placed to act "as a check on prosecutorial abuse and government overreaching"[19] and at greater risk of becoming "synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions."[20]

II. [Question 2] This Court should decide whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holdings in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances.

A. Louisiana's restrictive rule egregiously misapplies settled law that all relevant circumstances are to be taken into account in a Batson *analysis*

It is true that by its language, Louisiana's statutory prohibition on race based peremptory challenges does not apply when both the State and the defense have exercised a challenge against the same juror. La. C. Cr. P. art. 795(D) ("The

[19] *Kaley v. United States*, ___ U.S. ___; 134 S. Ct. 1090, 1114 (2014) (Roberts C.J., dissenting).

[20] *Faretta*, 422 U.S. at 826.

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.")

In Mr. McCoy's case, the Louisiana Supreme Court went on to hold that by operation of this statute, the prosecution's strike of Ms. Venus should not be considered when evaluating the prosecution strikes of other African American jurors because the defense had also exercised a peremptory challenge against Ms. Venus. App. A, 38, 41.

However, this Court in *Batson* held that "the trial court should consider all relevant circumstances" and that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson* 476 U.S. at 96-7. The Court then stated that "[o]nce the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson* 476 U.S. at 97.

The *Batson* framework seeks to extract answers to determine why the State was striking black jurors in a manner that gives rise to an inference of racial discrimination. *Johnson v. California*, 545 U.S. 162, 172-173 (2005). That inference is particularly strong where, apart from race, a struck juror appears to be so much more favorable to the State that the defense exercised a peremptory challenge against her.

In *Miller-el*, the Court reiterated that a defendant "may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Indeed, the Court in *Miller-el* expressly considered the answers of prospective jurors even though they had been struck by the defense, holding that their answers remained relevant to assessing the State's discriminatory intent. *Id* at 245 ("The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. . . . the underlying question is not what the defense thought about these jurors[.]").[21]

Once again, in *Foster*, this Court emphasized the imperative to take all relevant evidence into account:

> We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S., at 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175. As we have said in a related context, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

Foster v. Chatman, ___ U.S. ___, 136 S. Ct. 1737 (2016).

In Mr. McCoy's case, the Louisiana Supreme Court quoted from this precise passage in *Foster,* not to hold that the State's strike of Ms. Venus must be considered, but instead to support its rule that statistics alone cannot support a *prima facie* case. App. A, 41 n.43.

[21] Further to this point, "the constitutional rights *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial." *Johnson*, 545 U.S. at 171-2. And so for this reason also, the underlying question is not what the defense thought about the struck juror.

The rule announced by the Louisiana Supreme Court "egregiously misapplied settled law"[22] that all relevant circumstances are to be taken into account in a *Batson* analysis.

B. This Court should intervene because Louisiana's rule prohibits courts in Louisiana from considering some of the most damming evidence of discriminatory intent

As the defense argued at trial, the fact that the state struck Ms. Venus, a juror so pro-death that the defense also exercised a peremptory challenge against her, was a relevant circumstance in considering whether the defense had established a *prima facie* case or carried its burden to prove discriminatory intent.

The State's suspect strike of Ms. Venus was particularly relevant in this case where the State argued that it struck jurors based on their willingness to impose a death sentence. XIV.3118 ("No secret here. I'm trying to get people on the jury that I think will impose the death penalty. I don't want the doves. I want the hawks."). In offering reasons for its strikes of Ms. Curry and Mr. Landry, the District Attorney argued that he had struck each because he did not believe that either was sufficiently pro-death penalty. App. A, 37.

The evidence that the trial court and the Louisiana Supreme Court refused to consider because of La. C. Cr. P. art. 795(D) shows that Ms. Venus was affirmatively and aggressively pro-death. On the State's proffered rationale for its other strikes, Ms. Venus should not have been the subject of a State strike. Indeed, the

[22] *Wearry v. Cain*, ___ U.S. ___, 36 S. Ct. 1002, 1007 (2016)(granting summary reversal where Louisiana Supreme Court egregiously misapplied settled law).

prosecution's strike of Ms. Venus was strong evidence that its stated reasons for striking other African-Americans were pretextual.

In her questionnaire, Ms. Venus chose options indicating she was "generally in favor of the death penalty," checked that she "agree[d]" that "the death penalty gives the criminal what he deserves" and wrote in that she felt "strongly" about the death penalty. Venus Juror Questionnaire, Questions 32(C), 95, 96(C) and 104(b).

The State asked Ms. Venus only four questions[23] in death qualification voir dire. IX.1962. Ms. Venus' answers to the state's four questions indicated that she: believed in the death penalty; could see imposing the death penalty for the killing of innocent people; believed herself capable of returning a death penalty; and, could give consideration to both penalties. IX.1962. Defense questioning disclosed that Ms. Venus strongly believed in the death penalty and could not consider childhood abuse as a mitigating circumstance. IX. 1966-7. Ms. Venus was obviously a favorable juror for the State and a disaster for the defense.

Applying La. C. Cr. P. art. 795(D), the trial court did not require the State to offer a race neutral reason for the strike of Ms. Venus and so no rebuttal was offered to the defense contentions that she was struck because she was African American. Nevertheless, the trial court and the Louisiana Supreme Court refused to consider the State's otherwise inexplicable strike of Ms. Venus.

[23] Ordinarily, "lack of questioning or mere cursory questioning before excluding a juror peremptorily is evidence that the explanation is a sham and a pretext for discrimination." *Alex v. Rayne Concrete Serv.*, 2005-1457 (La. 1/26/07); 951 So. 2d 138, 154 citing *Miller-El*, 545 U.S. at 246.

The strike of Ms. Venus: deepened the proof of a pattern of discriminatory strikes; put a lie to the State's claim that it was striking jurors based upon their views of the death penalty; and, in the absence of an alternative explanation, was evidence of a racially motivated strike that rendered a racial motive for the other prosecutorial strikes of African Americans more likely.

The effect of Louisiana's rule is to insulate from the *Batson* analysis the most suspect of prosecution strikes (those where the defense also wishes to strike the juror).

C. Mr. McCoy's case represents an excellent vehicle for resolving the question presented and this Court should take the opportunity to summarily reverse, particularly in light of Louisiana's dismal history of applying Batson

The question presented is squarely before this Court on direct appeal in a death penalty case,[24] was expressly argued in the trial court and appellate court and the ruling below decides an important question of federal law that conflicts directly with relevant decisions of this Court.

While the error here may be susceptible to review in federal habeas proceedings, Mr. McCoy must necessarily exhaust his state post-conviction remedies on all available claims before commencing habeas proceedings. It will be some considerable time before a federal habeas court has any opportunity to review this case and during this time Mr. McCoy will sit on death row "in service of a conviction

[24] As argued above, the fact that this is a death penalty case weighs in favor of granting Mr. McCoy's application.

that is constitutionally flawed."[25] During that time, the Louisiana Supreme Court's rule will continue in effect throughout Louisiana. Furthermore, there is no certainty that the present issue will be reached in federal habeas proceedings and so the rule may continue undisturbed.

Of course, the issue here is not important solely for Mr. McCoy or Louisiana but affects our nation's "overriding interest in eradicating discrimination from our civic institutions". *Johnson*, 545 U.S. at 172. As this Court observed in *Batson*, the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87.

This Court has recently emphasized the call for our Nation to rise above racial classifications and to purge racial prejudice from the administration of justice. *Pena-Rodriguez v. Colorado*, 15-606 (March 6, 2017), s*lip op.* 13. In doing so, this Court emphasized that racial discrimination in the jury system poses a particular threat to the promise of the Fourteenth Amendment and to the integrity of the jury trial. *Id.*

In considering whether to intervene now, it is proper for this Court to consider that Louisiana has a dismal history of enforcing the right to Equal Protection in jury selection[26] and of enforcing *Batson's* mandate.

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[25] *Weary*, 136 S. Ct. at 1008.

[26] Over the course of the last century, this court has had to intervene numerous times due to Louisiana's failure to afford Equal Protection in jury selection. *Pierre v Louisiana*, 306 U.S. 354 (1939); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Campbell v. Louisiana*, 523 U.S. 392 (1998).

In *Snyder*, this Court was forced to reverse the Louisiana Supreme Court's twice repeated rejection of a clearly meritorious *Batson* claim. *Snyder v. Louisiana*, 552 U.S. 472 (2008)(Reversing the Louisiana Supreme Court after having previously granted certiorari and remanded for reconsideration in light of *Miller-el*). The application for certiorari in that case was accompanied by an *amicus* brief from the Louisiana Association of Criminal Defense Lawyers documenting the State's *Batson* jurisprudence and concluding that "it is virtually impossible for a criminal defendant to succeed on review of a *Batson* claim under the standard as applied in Louisiana." *Snyder v. Louisiana*, 06-10119, 2006 U.S. Briefs 10119, 2 (May 18, 2007).

In 2016, this Court again granted certiorari on a *Batson* claim out of Louisiana, vacating and remanding for further consideration in light of *Foster*. *Williams v. Louisiana*, ___ U.S. ___, 136 S. Ct. 2156 (2016). The four judge concurrence in that case observed that Louisiana continued to apply a procedural rule that clearly violates the Constitution. *Id.* (Ginsburg, concurring).[27]

The improper rule in *Williams* forms part of the same statute that contains the improper rule applied in Mr. McCoy's case. Together they reflect a legislative

[27] On remand, a majority of the Louisiana Fourth Circuit Court of Appeals left the unconstitutional rule untouched and determined that the trial judge had supplied his own reasons for the State strikes *before* determining the question of whether a prima facie case existed and so declined relief. *State v. Williams*, 2013-0283 (La. App. 4 Cir. 09/07/16); 199 So. 3d 1222. Subsequently, the Louisiana Supreme Court has stated that having the trial court supply race neutral reasons does not conform with *Batson*, but the Court nevertheless affirmed that "[s]peculation by a trial court as to what the state's reasons might have been for striking potential jurors, may, if the record is sufficiently clear on all three steps of the *Batson* test, be sufficient to satisfy the requirements of *Batson*." *State v. Crawford*, 2014-2153 (La. 11/16/16); ___ So. 3d ___, *slip op.* 34.

response to *Batson* that functions to undermine the effectiveness of the *Batson* procedure in rooting out discriminatory intent.

This Court should intervene now to correct an egregious misapplication of settled law in an area of great public concern.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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Dated: March 6, 2017