NO. 11-8470

IN THE
SUPREME COURT OF THE UNITED STATES

FELTON DORSEY,
PETITIONER,

V.

STATE OF LOUISIANA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

THIS IS A CAPITAL CASE

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not contest that the questions presented give rise to two significant splits in the circuit courts on the handling of the first stage of the *Batson* analysis concerning 1) whether bare statistics are insufficient to make out a prima facie case of discrimination; and 2) whether a trial court's determination at the initial stage is reviewed under a highly deferential 'abuse of discretion' standard. Instead, Respondent argues both of these issues on the merits. Respondent's *Brief in Opposition* makes clear that the issues are ripe for review and clearly presented to the Court.[1]

Respondent does not contest Petitioner's observation that in the vast majority of trial cases throughout the country, all a proponent of a *Batson* objection will have is "bare statistics" to provide indicia of discrimination, or that without calling for a stage-two explanation, all but the most obvious efforts to discriminate will avoid detection. Moreover, as developed more

[1] Respondent's section titled "Correction of Petitioner's Misstatements" does not in fact reference any factual disputes in this case. Indeed, respondent acknowledges that it does not contest the demographic data concerning Caddo Parish or the venire itself. Respondent suggests that Petitioner's assertion that all but one African-American jurors were excluded from serving is not technically correct because "there was another African-American juror remaining who had been questioned during voir dire and was not excluded by either challenge for cause or peremptory challenge." Respondent is correct. The State did not have an opportunity to strike the last African-American juror, Eddie Dennis, who served as an alternate. However, had the State used its twelfth peremptory strike on any one of the seated jurors, including the one African-American juror that served – then Ms. Dennis would have served on the jury.

fully in the LACDL *Amicus Brief* filed in this case, the Louisiana Supreme Court has given trial and appellate courts free dispensation to avoid the difficult but important task of ferreting out discrimination in jury selection.

As noted in the Respondent's *Brief in Opposition*, when initially called to provide an explanation for strikes of African-American jurors, the prosecutor declined to do so asserting, *inter alia*, that bare statistics could not be sufficient to warrant a prima facie case of discrimination. The trial court and the Louisiana Supreme Court ultimately agreed. Without an inquiry into the prosecution's explanation for strikes, the courts will not ferret out or deter racial discrimination in jury selection. As a result, this important and re-occurring issue warrants this Court's resolution.

I. RESPONDENT'S ***BRIEF IN OPPOSITION*** RECOGNIZES THE SPLIT IN THE CIRCUITS ON THE QUESTION OF WHETHER BARE STATISTICS ARE INSUFFICIENT TO SUPPORT A PRIMA FACIE CASE OF DISCRIMINATION.

Respondent acknowledges a broad split in the courts on the issue of whether bare statistics are insufficient to establish a prima facie case of discrimination. It notes that the Second, Third, and Seventh Circuits hold that bare statistics are sufficient to make out a prima facie case of discrimination while the Louisiana and Alabama Supreme Courts, as well as

the Eighth and Tenth Circuits hold that bare statistics alone are insufficient. *See Respondent's Brief in Opposition* at 7; *see also id.,* at n. 1 & 2.

However, Respondent suggests that Mr. Dorsey's case is "not the proper vehicle" because "Petitioner's position would require that the bell be unrung." *Id*. Respondent suggests that this is not the proper case to address the issue because "evidence before the trial court, the Louisiana Supreme Court and this Court, should certiorari be granted, will necessarily include more than statistics alone." Petitioner did argue on appeal that there was more than bare statistics to support a prima facie case of discrimination (i.e., *inter alia,* the inter-racial nature of the offense, the fact that the state struck an African-American juror who indicated no opposition to the death penalty, that a *Batson* violation had occurred in a prior capital case in the district). But both the trial court and the Louisiana Supreme Court rejected these arguments, leaving Petitioner solely with statistics. The state Supreme Court then made the legal determination that bare statistics were insufficient as a matter of law to support a prima facie case of discrimination. As a result, this case is an excellent vehicle for resolving the claim.

Respondent also argues the merits of the claim asserting that "[i]f petitioner's position was adopted by this Honorable Court, bare statistics alone could be used to establish a prima facie showing of racial discrimination while other evidence available to the trial court goes ignored and unconsidered." *Respondent's Brief in Opposition* at 8-9. Petitioner does not suggest that "other evidence available to the trial court" could not be considered at the initial or third stage of the *Batson* analysis. Rather, the question is whether,at the first stage, the absence of additional evidence is dispositive.

II. RESPONDENT'S ***BRIEF IN OPPOSITION*** RECOGNIZES THE SPLIT IN THE CIRCUITS ON THE QUESTION OF WHETHER A TRIAL COURT'S DETERMINATION AT THE INITIAL STAGE OF THE BATSON ANALYSIS SHOULD BE REVIEWED UNDER AN "ABUSE OF DISCRETION" STANDARD.

Respondent acknowledges the widespread confusion and split in the lower courts concerning the standard of review of a trial court's initial determination that no prima facie case of discrimination exists. *See Respondent's Brief in Opposition* at 10-11. Respondent cites cases from the First, Eighth, Ninth and Eleventh Circuits which use an abuse of discretion standard; cases from the Seventh and Tenth Circuits which use a *de novo* standard; and cases from Minnesota and Michigan which use a mixed

standard of review "by giving the trial court discretion in its factual findings but reviewing the legal conclusions under a de novo standard." *Id.*

Respondent argues that reliance on an abuse of discretion standard does not prevent "meaningful review for discriminatory intent." *Id.* at 11. Although respondent's quotations from *Tolbert v. Page*, 182 F. 3d 677 (9th Cir. 1999) (see *Respondent's Brief in Opposition* at 12) explain the rationale for one side of the split on the issue, they also reflect the unresolved nature of the question. This Court should grant certiorari to address these issues.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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