No. 11-8470

IN THE
Supreme Court of the United States

FELTON DEJUAN DORSEY
Petitioner,
v.

STATE OF LOUISIANA
Respondent.

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

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF AMICUS CURIAE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Louisiana Association of Criminal Defense Lawyers (LACDL) hereby moves, pursuant to S. Ct. R. 37.2(B), for leave to file the accompanying amicus curiae brief in support of the petition for writ of certiorari to the Louisiana Supreme Court.

Counsel for each party were timely notified of the intention to file the attached brief. Petitioner, Felton Dorsey, consented to the filing of this brief; Respondent, the State of Louisiana, did not consent.

As set forth in the accompanying brief under "Statement of Interest," amicus is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. The LACDL has an interest in the effective application of the Equal Protection Clause to jury selection in Louisiana and, in particular, eradicating the improper exclusion of African-American citizens from jury service resulting from race-based strikes by prosecutors.

The LACDL and its membership have had a longstanding interest in the elimination of racial discrimination in jury selection in Louisiana and have previously filed amicus briefs addressing this issue before this Court in *Snyder v. Louisiana*, 551

U.S. 1144 (2007)(cert. granted) and Dressner v. Louisiana, 131 S. Ct. 1605 (2011)(cert. denied). The LACDL has also regularly conducted trainings for its members to raise awareness about and increase the effectiveness of members' responses to the improper exclusion of African Americans by state prosecutors in Louisiana. Accordingly, the LACDL respectfully requests that the Court grant leave to file the attached amicus curiae brief.

Respectfully submitted,

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INTERESTS OF *AMICUS CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) was incorporated in 1985 and is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. LACDL is, from time to time, invited by the Louisiana Supreme Court to submit *amicus* briefs in appropriate cases and has submitted such briefs in this Court on discrete topics of particular interest.

Amicus has an interest separate from the Petitioner and Respondent in this case. *Amici* respectfully suggest that this Court grant the Petition to consider in full Louisiana courts'

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[1] Pursuant to this Court's Rule 37, *amicus* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Counsel for each party were timely notified of the intention to file the attached brief. Petitioner, Felton Dorsey, consented to the filing of this brief, Respondent, the State of Louisiana, did not consent.

incomplete application of *Batson v. Kentucky,* 476 U.S. 79 (1986).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since *Strauder*[2] there has been an ongoing battle in Louisiana to achieve the effective implementation of the Equal Protection Clause to jury service by African Americans.[3] That battle continues, with African Americans continuing to be underrepresented in jury service and dramatically overrepresented in the group of citizens removed from jury service by the State through the use of peremptory challenges.

The Louisiana Supreme Court's opinion in the instant case – in which it held that a statistical showing that the prosecution exercised peremptory challenges against 71% of prospective African-American jurors while only exercising peremptory challenges against 22% of prospective white jurors was not sufficient to make a prima facie showing of

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[2] *Strauder v. West Virginia*, 100 U.S. 303 (1880).

[3] See, *State v. Joseph*, 45 La. Ann. 903 (La. 1893); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *State v. Coleman*, 236 La. 629 (La. 1959); *State v. Scott*, 237 La. 71 (La. 1959); *State v. Wilson*, 240 La. 1087 (La. 1961); *State v. Clark*, 242 La. 914 (La. 1962).

discrimination under Batson – is but the latest sad chapter in a long history of racial discrimination in jury selection in Louisiana.

LACDL and its membership have invested a great deal of effort in identifying, documenting and increasing awareness of the continuing effects of racial discrimination and the use of racial stereotypes in jury selection in Louisiana. Those efforts have included empirical research in racial hot spots like Caddo Parish - where the trial in the instant case took place - and Jefferson Parish. The research shows that on average prosecutors in Caddo Parish use their peremptory challenges against African Americans at a rate of 3.4 times the rate that they are used against non-African Americans.

LACDL has also sought to highlight for this Court in previous amicus briefs the weaknesses and limitations in the application of *Batson*[4] in Louisiana.[5]

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

[5] *Brief of Amicus Curiae LACDL*, *Snyder v. Louisiana*, 06-10119; *Brief of Amicus Curiae LACDL, Dressner v. Louisiana*, 10-752.

Whatever the limitations of *Batson*, however, it is certainly far better than nothing and the signal achievement of *Batson*'s three-step analysis is to require the prosecution to state reasons for its peremptory challenges. Two of the Louisiana Supreme Court's three *Batson* reversals have come in cases where the prosecutor offered reasons that made explicit that race was at the heart of the peremptory challenge.

As demonstrated by a more recent example in which a Louisiana prosecutor eventually conceded that he was "just not comfortable putting a bunch of African-Americans on the jury", it is only by pressing the prosecution for reasons that a court can detect and respond to the very real problem of intentional discrimination in jury selection. *State v. Wilkins*, 11-1395 (La. 3rd Cir., *Appeal Pending*).

Frequently, the pattern of peremptory challenges – the statistical evidence – will be the only direct evidence that can be offered in support of a *prima facie* case. By barring courts from finding a *prima facie* case based upon statistical evidence, the Louisiana Supreme Court has pulled *Batson's* teeth and dramatically reduced the opportunity to identify and prevent racial discrimination in jury selection.

The issue presented here is also presented in two other Louisiana cases, one capital and one non-

capital, currently on the court's docket. *Holand v. Louisiana*, 11-8915 (concerning the Louisiana Supreme Court's opinion rejecting the appellate court's finding of a *prima facie* case of discrimination where 10 of 11 strikes were against African-American jurors.); *El Mumit v. Louisiana*, 11-7669 (concerning the Louisiana Supreme Court's holding that no prima facie case of discrimination was present where the prosecution struck the only two African American jurors).

ARGUMENT

I. Empirical research has demonstrated that a disproportionate number of African American jurors are excluded from jury service in several Louisiana jurisdictions by the prosecution's use of peremptory challenges

Batson dispensed with *Swain*'s[6] crippling requirement of showing "that the peremptory challenge system was 'being perverted'" by "proof of repeated striking of blacks over a number of cases". *Batson*, 476 U.S. at 92. The work that had been required to meet *Swain*'s difficult burden was described by the Court as follows:

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[6] *Swain v. Alabama*, 380 U.S. 202 (1965).

> . . . the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges.

Batson, 476 U.S. at 93 n.17.

Empirical research undertaken in several Louisiana jurisdictions has followed Swain's roadmap – a roadmap that imposes a higher burden than that required to prevail under *Batson* but which is still instructive – and documented a significantly higher rate of prosecution peremptory challenges against African American jurors.

In Caddo Parish, the judicial district in which the trial in the present case was conducted, a pilot study of prosecution strike rates has been conducted on identified cases where adequate information regarding jury selection exists in the clerk's office.[7] The review of 120 jury cases

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[7] Results of the study and the raw data were filed in the record as a part of Defendant's *Omnibus motion for new trial, for arrest of judgment, to bar the death penalty and for relief from discrimination in jury selection* in *State v. Tucker*, 273,436 (1st JDC) filed June 16, 2011.

prosecuted by the Caddo Parish District Attorney's Office between 1997 and 2009 revealed that the state peremptorily challenged 387 out of 809 black jurors presented (47.8%). During the same period, the state challenged only 240 out of 1727 non-black jurors (13.9%). That is, the state rejected potential black jurors at 3.4 times the rate that it rejected non-black jurors.

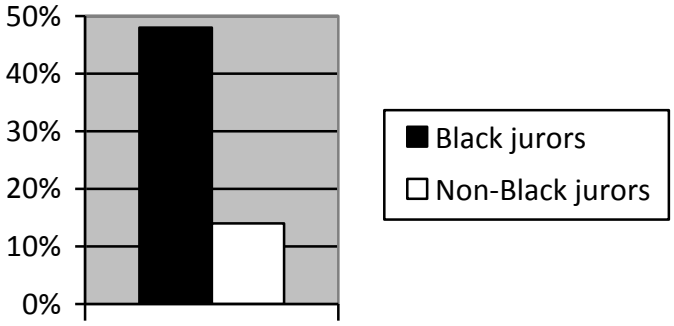

Chart 1. Caddo Parish DA's Office: Peremptory Challenges 1997-2009 by Race

An analysis in neighboring Bossier Parish, a much smaller community with a smaller African-American population, has also disclosed a pattern of discriminatory strikes.[8] The analysis revealed

[8] Results of the study and the raw data were filed in the record as a part of Defendant's *Supplemental Motion for New Trial* in *State v. McCoy*, 163,572 (26th JDC) filed January 17, 2012.

that from 2007 to 2011, the state peremptorily challenged 52 out of 156 black jurors presented (33.3%). During the same time period, the state challenged only 121 out of 889 non-black jurors (13.6%).[9] That is, the state rejected potential black jurors at 2.45 times the rate that it rejected non-black jurors.

LACDL has previously detailed for this Court the results of an analysis of prosecution peremptory challenge rates in Jefferson Parish, Louisiana. *See Brief of Amici LACDL*, *Snyder v. Louisiana*, 06-10119, pp.15-7. That study of 390 trials from 1994 to 2002 showed that prosecutors used peremptory strikes to remove 55% of African-American prospective jurors who were otherwise eligible to serve, but only peremptorily challenged 16% of white prospective jurors. That is, the state rejected potential black jurors at 3.4 times the rate that they rejected non-black jurors.

This Court granted certiorari and ultimately granted *Batson* relief in 2008 in *Snyder v. Louisiana*, 552 U.S. 472 (2008). A study of jury

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[9] The pool of jurors whose selection outcomes were examined was 1,041 prospective jurors, performed by attending the 50 trials between January 1, 2007 and July 31, 2011 for whom race and jury selection outcome data was available from the records of the Clerk of Court.

selection patterns in Jefferson Parish following this court's scrutiny in *Snyder* has shown a reduced but persistent racially disproportionate use of prosecution peremptory challenges.[10] The analysis revealed that from April 2009 to March 2011, the state peremptorily challenged 401 out of 940 black jurors presented (42.7%). At the same time, the state rejected only 557 out of 3,370 non-black jurors (16.5%). That is, the state rejected potential black jurors at 2.6 times the rate that they rejected non-black jurors.

It is the experience of *amicus curiae* and its members that the disproportionate use of peremptory strikes by prosecutors in Louisiana continues to be a significant problem, especially in Caddo Parish where the instant trial took place, and the Louisiana Supreme Court's implementation of *Batson* allows the problem to flourish.

II. It is only by requiring a prosecutor to provide reasons for peremptory challenges, that *Batson*'s three step

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[10] Results of the study and the raw data were filed in the record as a part of Defendant's *Omnibus motion for new trial, for arrest of judgment, to bar the death penalty and for relief from discrimination in jury selection* in *State v. Doyle*, 05-5262 (24th JDC) filed July 25, 2011.

procedure has improved the reach of the Equal Protection Clause in Louisiana

While *Batson's* three-step analysis has significant limitations, it is considerably more effective than either the burden established under *Swain* or nothing at all. Louisiana courts and the Louisiana legislature have however been somewhat loath, however, to find a *prima facie* case or to require that racially neutral reasons be offered by the prosecution.

As previously reported to this Court by *Amicus Curiae*, Louisiana trial courts have been slow to find a *prima facie* case and have preferred an approach whereby reasons are offered voluntarily.

> A review of the post-*Batson* cases before the Louisiana Supreme Court shows that when faced with a *Batson* challenge in Louisiana a trial court may take a range of steps but only rarely will this involve an explicit finding that a prima *facie* case has been made out. A trial court may:
> - Explicitly decline to find a *prima facie* case and receive no reasons (6 cases);
> - Explicitly decline to find a *prima facie* case but request or receive reasons for the record (7 cases);

- Ask for reasons and give no indication of whether this is as a result of finding a *prima facie* case or for the purposes of appellate review (11 cases);
- Remain mute and allow the prosecutor to volunteer reasons (6 cases);
- Explicitly find a *prima facie* case and require reasons (3 cases).

See *Brief of Amicus LACDL*, *Snyder v. Louisiana*, 06-10119, pp.7-8 (footnotes omitted).

Under Louisiana law, even when a *prima facie* case is found the legislature has provided that the trial court need not ask for reasons if the court is satisfied that the reasons are apparent from the voir dire examination of the juror. La. C. Cr. P. art. 795(C).

All of that said, in two of the Louisiana Supreme Court's only three cases[11] granting *Batson* relief, the reasons provided explicitly disclosed that the prosecutor had been motivated by race. *See State v.*

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[11] The third is *State v. Collier*, 553 So. 2d 815 (La. 1989), where the trial court had explicitly declined to undertake step three of the *Batson* analysis. The court found the state's proffered reasons to be pretextual.

Harris, 820 So. 2d 471 (La. 2002)(prosecutor's stated reason for the strike was that the juror was a "single black male . . . with no children"); *State v. Coleman*, 970 So. 2d 511 (La. 2007)(Prosecutor explicitly interjected race in providing his explanation for a peremptory challenge).

More recently, a prosecutor in south-west Louisiana provided a text book illustration of the need for a defendant to be able to establish a prima facie case by reference to the pattern of prosecution strikes in a case and the discriminatory intent that can be exposed when reasons must be given. *State v. Wilkins*, 11-1395 (La. 3rd Cir., a*ppeal pending*).

In *Wilkins*, an African-American Assistant District Attorney prosecuted a white-on-white second degree murder case in which the victim was alleged to be a member of the Ku Klux Klan. The prosecution struck all four of the qualified African Americans using peremptory challenges. A *Batson* challenge was made and on the basis of the statistical showing alone, the trial court required the prosecutor to provide race-neutral reasons.

While initially offering pretextual reasons, when challenged by the court, the prosecutor admitted that the strikes of all of the African American jurors were based on the jurors' race, stating that he was "just not comfortable putting a bunch of African-Americans on the jury".

The full exchange between the prosecutor and the trial court exemplifies why a *prima facie* case brought on the basis of a statistical pattern of strikes and the requirement that reasons be offered have a continuing and vital role in the enforcement of the Equal Protection Clause. The relevant pages from the record lodged and pending on appeal read:[12]

DEFENSE COUNSEL:

> Your Honor, we would raise an objection at this time to the State's pattern of strikes. The state has now struck each and every African-American juror tendered to them, creating a pattern in a case where, as you have heard already in these proceedings, the State certainly perceives race and race perception issues and the State has now struck off this jury every African-American prospective juror.

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[12] For clarity, counsel are identified by their role, rather than by name.

THE COURT:

> I have gotten no reasons why. And I have noted as we went along that of the four African-Americans, five African-Americans – no, four that have been tendered to the State, they have challenged each one. And that is half of their challenges.
>
> I will ask the State to give me a response as to why you think it is appropriate that you should strike Ms. Mitchell. That is the one it is raised on.

ASSISTANT DISTRICT ATTORNEY:

> Ms. Mitchell stood before the Court and said she had back problems, and she said she may have to stand throughout the entire trial. She also said that she had a nephew accused of a crime, Your Honor.

THE COURT:

> That she had, what?

ASSISTANT DISTRICT ATTORNEY:

A nephew accused of a crime.

THE COURT:

But in response to my question she was very candid about that and said she thought he was treated fairly, I think, and that's not going to do anything to harm her as a juror.

ASSISTANT DISTRICT ATTORNEY:

With all due respect, Judge -- and I do mean this with respect when she tells me that she has a nephew accused of a crime, that's a problem with this prosecutor; because if my office has accused her nephew of a crime, and I don't know what she is thinking in the back of her mind about the prosecutor, and then I'm here for a race-neutral reason, that's my race-neutral reason. I respect what the Court is saying. I'm not being disrespectful. But what I'm saying –

THE COURT:

> Okay. I am not going to recognize that as a race-neutral reason as being a valid reason.
>
> She has responded to me that she thought he was treated fairly. So, I'm going to deny that challenge for cause on –

ASSISTANT DISTRICT ATTORNEY:

> What about the other reasons, Your Honor, the fact that she has back problems, she has to stand up, she says.

THE COURT:

> We dealt with that, too. I asked her if it was okay if she could stand and if I made arrangements for her to sit on the end if she would stand. That's not going to be disruptive to my court. So, that's not an issue for me either.

ASSISTANT DISTRICT ATTORNEY:

> I have one last point, if I can.

THE COURT:

> You already had. You already had that opportunity. I asked you what were your reasons, and you gave me two.

ASSISTANT DISTRICT ATTORNEY:

> I apologize, Your Honor, if I offended you. When you asked me about the reasons you questioned me about the last one.

THE COURT:

> I did.

ASSISTANT DISTRICT ATTORNEY:

> I have one I am uncomfortable putting on the record, but I will put it on the record.

THE COURT:

> Well, if you want to give me a reason why -- that I am going to recognize as to why I should let you challenge this juror, you better do it.

ASSISTANT DISTRICT ATTORNEY:

Okay. I'm sorry, Your Honor.

There is a police report that involves Mr. Wilkins, in which Mr. Wilkins, if this Court allows in the overt act, that in that report that they plan to put forth as his bad acts, he referred to a potential victim as a N-loving queer. There's another statement that emanates from them in where -- saying that the victim made those statements. But the defense is purporting to put forth the KKK, that the victim was a member of the KKK.

And the fact that Ms. Mitchell is an African-American, I didn't want to run the risk of putting her on this jury -- and it applies to the rest of them also -- if this Court would allow in KKK issues about my victim, whether or not they would be would hold that against my victim, being a member of it. I understand the Court's perspective but I thought it was in the mind of me, as a prosecutor on this case. And I am uncomfortable with it. I'm very -- I'm uncomfortable with somebody being KKK around me, and

I would suspect that she would be also. And I just don't want my case being tried on letting him go because the victim -- I mean, the jurors may say, man, he was a member of the KKK. I don't know what may or may not come in. And that's an issue with me. And it is an underlying issue I have with the other three African-Americans.

THE COURT:

I guess my concern is how can I judge that because I heard no questions about that. Am I supposed to assume a bias because you have one?

ASSISTANT DISTRICT ATTORNEY:

Your Honor, because, I mean, I think you put a unwritten rule of sorts because when you didn't -- we don't know whether or not this overt act is going to come in.

And I heard from you and correct me if I'm wrong -about this issue of the KKK, that it may be -- if

> the opportunity presents itself you may let it in.
>
> I'm not -- I wasn't going to stand before this jury and start talking about my guy being a potential member of the KKK. I just wasn't going to do it unless I got emphatically from you that you were going to let it in. Then I would voir dire on it.
>
> I don't think you are going to let it in. But that underlying word "think,"" I don't know. And I am not -- I am just not comfortable putting a bunch of African-Americans on the jury where the defense -and what's the reason for them going to bring up something about KKK or that N-loving word? What's the probative value of that in this trial, other than to inflame a jury? And I think blacks would be a little bit more inflamed by that word than others.

State v. Wilkins, 11-1395 (La. 3rd Cir., *Appeal Pending*), Vol. XXV, pp.4855-4862.[13]

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[13] The Record is on file with the Louisiana Third Circuit Court of Appeal.

Had the Louisiana Supreme Court's holding in the present case been applied in the *Wilkins* case, no reasons would have been sought and four African Americans would have been struck based – as the prosecutor ultimately admitted – upon their race.[14] It was only because the trial court accepted the statistical showing of racial disparity in the use of peremptory challenges as a *prima facie* case of discrimination that it ultimately uncovered the prosecutor's purposeful discrimination in his exercise of peremptory challenges.

CONCLUSION

The use of prosecution peremptory challenges motivated by racial stereotypes or racial animus continues to be a serious problem in Louisiana and one that is difficult to detect and remedy. This Court should grant certiorari in this case to review the Louisiana Supreme Court's most recent ruling that further restricts the ability of criminal defendants and racial minorities to expose and combat this invidious practice.

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[14] The trial court ultimately reseated one struck juror, allowed the peremptory challenge to stand against another, and refused to consider the *Batson* objection to two others as they had already been allowed to leave the court the previous day.

RESPECTFULLY SUBMITTED

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